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No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL NO. 12, AFL-CIO,
Petitioner,

v.

CARROLL WILSON, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Ninth Circuit held in this case that one party to a collective bargaining agreement can sue the other under *either* § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, *or* state law on a claim that the agreement is void because of fraud in the underlying collective bargaining negotiations. On this basis, the court of appeals affirmed a judgment for compensatory damages based on a *state law* fraud claim. The question raised by this decision is:

Whether a state law cause of action seeking compensatory damages for fraud in the collective bargaining negotiations that lead to a collective bargaining agreement is within the area covered by § 301's paramount federal common law of labor contracts, and therefore preempted?

LIST OF PARTIES TO THE PROCEEDING

Operating Engineers Pension Trust
Operating Engineers Health and Welfare Fund
Operating Engineers Vacation-Holiday Savings Trust
Operating Engineers Training Trust
Carroll E. Wilson
Patricia J. Wilson
Wilson Equipment, a Partnership
International Union of Operating Engineers, Local No. 12
Hoss Kinsey

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PETITION FOR A WRIT OF CERTIORARI

International Union of Operating Engineers, Local No. 12, third-party defendant in the district court and appellant in the court of appeals, petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Operating Engineers Pension Trust v. Wilson*, 915 F.2d 535 (9th Cir. No. 88-6559, October 2, 1990).

OPINIONS BELOW

The opinion of the court of appeals is reported at 915 F.2d 535 and is reprinted in the separately bound appendix to this *certiorari* petition (hereafter Pet. App.) at pp. 1a-16a. The district court issued an opinion as to some aspects of the case which is unreported and appears at Pet. App. 30a-34a.

JURISDICTION

The court of appeals' judgment was entered on October 2, 1990, and its order denying rehearing was entered on February 26, 1991. On May 9, 1991 Justice O'Connor entered an order extending the time for filing this *certiorari* petition to and including June 27, 1991. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 29 U.S.C. § 185(a). The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5), provides:

> It shall be an unfair labor practice for an employer—. . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 8(b)(3) of the National Labor Relations Act, 29 U.S.C. § 158(b)(3), provides:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * *
>
> (3) to refuse to bargain collectively with an employer, provided it is a representative of his em-

ployees subject to the provisions of section 159(a) of this title[.]

STATEMENT OF THE CASE

1. The issues in this case arose when four union-management trust funds established to provide benefits to employees covered by certain collective bargaining agreements sued the Wilson Equipment Company and the company's principals ("the Wilsons" or "the employer") to recover fringe benefit contributions alleged to be due and owing. The Wilsons defended on the ground that the collective bargaining agreement on which the trust funds based their claim was void because entered into as a result of fraud.

The Wilsons also filed a third-party complaint against International Union of Operating Engineers, Local No. 12 ("Local 12" or "the union") asserting, as here relevant, a pendent state law fraud claim seeking damages for emotional distress, punitive damages, and indemnity for economic losses. Pet. App. 4a-5a.

The third-party complaint alleged that the Wilsons were induced to enter into the collective bargaining agreement because of two statements made by a union business agent. The first statement was that the employer had to be a union contractor to continue to do work on a particular construction site; the second indicated that the agreement offered for signature would not affect the "status with Local 12" of Mr. Wilson (who was already a union member). Pet. App. 4a.

It was further alleged that each of these statements was false: The first because the general contractor on the construction site in question did not in fact require that all subcontractors have union collective bargaining agreements. And the second because Mr. Wilson understood the union's statement regarding union "status" to refer not to his *personal* status as a union member, but to the status of his company as an employer, which the agreement did indeed affect. Pet. App. 4a.

In response to the third-party complaint, the union took the position that no state tort cause of action for fraud in negotiating a collective bargaining agreement will lie where the agreement concerns employees covered by § 301 of the Labor Management Relations Act ("LMRA") 29 U.S.C. § 185, and § 8 of the National Labor Relations Act ("NLRA") 29 U.S.C. §158.

2. Eventually this case was tried to a jury. The district court, in a ruling passing on the union's LMRA § 301 defense, distinguished between the two statements alleged to be fraudulent: With respect to the statement that signing the collective bargaining agreement would not affect Wilson's "status with Local 12", that court ruled that § 301 precludes a state law action for fraud because it would be necessary to construe the agreement in order to determine the truth or falsity of the statement. As to the statement that the employer would have to sign a union agreement in order to qualify for certain work, however, the district court ruled that § 301 does not preclude a state fraud claim because the truth of the claim could be adjudicated without considering the meaning of the agreement.[1]

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[1] Throughout this case, the courts and the litigants have referred to the claim as to the effect on union "status" as alleging "fraud in the execution", and the claim as to the need for union contractor status as alleging "fraud in the inducement," echoing the Ninth Circuit's terminology in *Southwest Administrators, Inc. v. Rozay's Transfer, Inc.*, 791 F.2d 769, 774-75 (9th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987) (*Rozay's I*).

As to the "status with Local 12" remark, the parties agreed that the union representative indeed made the remark, but disagreed about whether Mr. Wilson reasonably understood the statement to mean that signing the agreement would not affect his status as an *employer*, as opposed to his status as an *individual union member*. There was completely conflicting testimony, however, concerning the "union contractor status" remark, with the union business agent testifying that in fact it was a representative of the general contractor, not of the union, who told Mr. Wilson that the employer could only continue on the job if the Wilsons signed a union collective bargaining agreement. Pet. App. 3a.

In accord with the forgoing ruling the district judge specifically instructed the jury that the elements of a state law fraud claim and a § 301 fraud claim are different. Under California law, fraud can be based on *either* intentional *or* negligent misrepresentation, and damages can include compensation for emotional distress as well as punitive damages. Pet. App. 21a-24a. In contrast, the jury was instructed that on the § 301 fraud claim, liability must be premised upon an intentional misrepresentation, and the relief available is rescission of the agreement and equitable indemnity for economic losses (to be assessed by the judge), but not emotional distress or punitive damages. Pet. App. 24a-25a.

So instructed, the jury returned a verdict for the Wilsons on both the state and the federal fraud claims. On the state law cause of action, the jury awarded $200,000 in emotional distress damages; on the § 301 "fraud in the execution" claim, the jury found liability only, leaving the amount of the indemnity to the judge (as instructed). Pet. App. 21a-25a.[2]

3. On appeal, a divided panel of the Ninth Circuit upheld the district court's preemption rulings. The majority, Circuit Judge Hug and District Judge Ezra (sitting by designation) recognized that "an action for fraud in the inducement is cognizable under section 301, to test the

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[2] The collection action by the trusts was tried at the same time. The jury found for the Wilsons in that action, on the ground that the underlying collective bargaining agreement was void *ab initio* for lack of mutual assent. Pet. App. 19a.

Thus, although, on the district judge's view of the case the union would have had to indemnify the Wilsons on either the state or the federal fraud claim for any payments made by the Wilsons to the trusts, in fact no such payments were made.

The district judge did, however, hold the union liable (jointly and severally with the trusts) for consequential damages for the two fraud causes of action in an amount equal to the attorneys' fees incurred in defending the collection action. Pet. App. 27a.

The jury, although finding that the union's misrepresentation was intentional, declined to award punitive damages.

formation of an agreement." Pet. App. 9a. Despite the availability of that precisely parallel § 301 cause of action, however, the court of appeals determined that an employer or a union also has a *state law cause of action for fraud*. The court of appeals majority read several of this Court's cases—principally *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985) and *Lingle v. Norge Division of Magic Chef Inc.*, 486 U.S. 399 (1988)—as dictating this result.

On the Ninth Circuit's reading of these precedents, only "the possible state interference with consistent *interpretation* of a collective bargaining agreement evokes preemption." Pet. App. 8a (emphasis added). Even though a fraud claim impugns the validity of the agreement as a whole, the majority maintained that there is no § 301 preemption because the state-law claim does not "require reference to the collective bargaining agreement." Pet. App. 10a.[3]

Judge Canby dissented, reasoning that

> When a state claim cannot succeed unless the state court determines that a collective bargaining agreement is invalid, that state claim is not "independent" of the collective bargaining agreement within the meaning of *Lingle*. *Lingle* establishes that a state claim is not independent when it requires construction of the collective bargaining agreement. . . . To hold that a collective bargaining agreement means nothing—that it is invalid—is the most radical form of construction. . . . Whether a collective bargaining agreement is valid, and what types of conduct may

[3] The court of appeals majority also held that there is no preemption of the state law cause of action for fraud alleged here under *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959) and its progeny. Pet. App. 10a-12a. While noting that under other circumstances "a misrepresentation at the bargaining table [can be] an unfair labor practice," Pet. App. 12a, the majority maintained that "in the absence of a recognized bargaining relationship, [the] misrepresentation to Wilson at the jobsite is not arguably a violation of section 8(b)(3) [of the NLRA]," Pet. App. 12a.

vitiate an otherwise valid agreement, are matters that ought to be governed by uniform federal law. [Pet. App. 14a-15a.]

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The Ninth Circuit held in this case that one party to a collective bargaining agreement can sue the other under *either* § 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185, *or* state law on a claim that the agreement is void because of fraudulent conduct in the underlying collective bargaining negotiations. The court of appeals created this option even where—as the district court ruled—the elements of the § 301 cause of action and the remedies available thereunder differ significantly from those under state law.

The question presented is thus, whether a fraud action of this kind is within the area covered by § 301's federal common law of labor contracts, and, if so, whether that § 301 law preempts state law. For two compelling reasons this question requires this Court's immediate attention.

First, the courts of appeals have grappled for years with questions concerning the appropriate source of law, federal or state—and the appropriate forum or fora—for determining the legal issues raised by challenges to the validity of collective bargaining agreements, with incompatible results. At the same time, *no* court of appeals has reached the conclusion reached by the Ninth Circuit here: *viz.*, that the parties to a facially valid collective bargaining agreement can sue *either* under § 301 itself *or* under state law to invalidate the agreement on the basis of fraud. Given the frequency with which unions and employers negotiate on a multistate basis, and the likelihood that a single collective bargaining agreement may apply in different jurisdictions, it is of particular prac-

tical importance that the most basic legal questions affecting the validity of such agreements be covered by a uniform legal rule and not different rules within different circuits.

Second, the Ninth Circuit's result in this case is squarely at odds with more than thirty years of this Court's jurisprudence. The precedents in this Court, we submit, stand for the propositions that in enacting § 301 Congress intended to provide for uniform nationwide standards governing *all* the legal questions that relate directly to the negotiation and enforcement of collective bargaining agreements, and that these standards are to be developed from—and be consistent with—the overall national labor policy. Contrary to the Ninth Circuit's supposition, this Court's most recent § 301 preemption cases—like its earlier cases—are firmly grounded in these basic principles. The question whether the federal common law of collective bargaining agreements is, as we believe, uniform and exclusive over its entire range or, instead, supplants state law only within a limited area is one that is absolutely fundamental to the proper implementation of the federal labor laws.

I. THE COURTS OF APPEALS' LAW GOVERNING THE ADJUDICATION OF THE VALIDITY OF COLLECTIVE BARGAINING AGREEMENTS IS IN DISARRAY

The pivotal legal issue in this case is whether federal law, state law—or, as the Ninth Circuit held, both—governs where the validity, and hence the binding effect, of a collective bargaining agreement is challenged. The court of appeals' decisions on this issue are in disarray.

1. (a) LMRA § 301 provides in terms for federal court "[s]uits for violation of contracts between an employer and a labor organization representing employees". 29 U.S.C. § 185(a). And, in *Textile Workers Union v.*

Lincoln Mills, 393 U.S. 448 (1957), this Court held that § 301 is not merely a jurisdictional grant, but also "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements." *Id.* at 451.

There is a long-standing split in the circuits on both of the following issues: (1) whether § 301 empowers the federal courts to adjudicate issues relating to the negotiation, and the validity, of a collective bargaining agreement; and (2) if so, whether that jurisdictional grant obtains only when such issues are raised by the defendant in a § 301 suit to enforce the agreement.

Five circuits, including the Ninth Circuit, now hold—in some instances reversing earlier decisions to the contrary—that the federal common law fashioned under § 301 *does* cover cases raising issues concerning the validity of collective bargaining agreements, whether the plaintiff is seeking to enforce the agreement or to void the agreement. *I.B.E.W., Local 481 v. Sign-Craft, Inc.*, 864 F.2d 499 (7th Cir. 1988); *Mack Trucks, Inc. v. Intern. Union, UAW*, 856 F.2d 579 (3d Cir. 1988); *Rozay's Transfer v. Local Freight Drivers, L. 208*, 850 F.2d 1321 (9th Cir. 1988), *cert. denied*, 490 U.S. 1030 (1989) (*Rozay's II*); *McNally Pittsburg, Inc. v. Intern. Iron Workers*, 812 F.2d 615, 618-19 (10th Cir. 1987); *Board of Trustees v. Universal Enterprises, Inc.*, 751 F.2d 1177, 1184 (11th Cir. 1985). *See also United Steelworkers of Am., AFL-CIO v. Rome Indus. Inc.*, 437 F.2d 881, 882 (5th Cir. 1970).

Two circuits, however, hold that while there *is*, or may be, § 301 jurisdiction to adjudicate contract validity issues raised by the *defendant* in an action brought to enforce a collective bargaining agreement, there is *no* such jurisdiction where a *plaintiff* brings an action to have an agreement declared invalid and unenforceable, whether because of fraud or for another reason. *A.T. Massey Coal Co., Inc. v. Intern. Union*, 799 F.2d 142 (4th Cir.

1986); *Hernandez v. National Packing Co.*, 455 F.2d 1252 (1st Cir. 1972).[4]

Yet another circuit has recently determined that there is *no § 301 jurisdiction at all* to determine contract validity issues—including whether fraud affected the formation of a collective bargaining agreement—even if the issue arises in the course of a suit filed to enforce the agreement. *Huessner v. National Gypsum Co.*, 887 F.2d 672, 676 (6th Cir. 1989).

(b) The union involved in *Rozay's II*, *supra*, filed a *certiorari* petition and this Court then invited the Solicitor General to file a brief *amicus curiae*. *See* Brief for the United States as Amicus Curiae in *Local Freight Drivers, Local 208 v. Rozay's Transfer, Inc.*, No. 88-535 ("U.S. Br."). The Solicitor General argued, first, that the Ninth Circuit was correct in ruling that § 301 does empower the courts to consider contract validity issues and, second, that there was no need for this Court to review the Ninth Circuit's decision there.

In so doing the Solicitor General *assumed*—correctly, we submit—that the decisions of the various courts of appeal determining that a § 301 cause of action is available against fraudulent conduct in negotiating a collective bargaining agreement necessarily entails the holding that *no state law cause of action is available*:

> This interpretation of Section 301(a) is necessary to assure the consistent applicability to collective agreements of federal law fashioned under that provision. . . . Fraud in the inducement is a traditional

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[4] *Hernandez*, a very brief opinion, concerned a situation in which a group of employees sought to void a collective bargaining agreement because, they asserted, the union entering into the contract no longer represented the majority of the employees. 455 F.2d at 1253. The case can perhaps be read as limited to the situation in which the asserted invalidity is premised upon a representational question, or at least upon a claim of invalidity not available in a traditional contract action.

> contractual defense that can be interposed in a Section 301(a) action for breach of a collective bargaining agreement. When such a defense is raised, its validity is determined by reference to federal common law.
>
> * * * *
>
> If a purpose of Section 301(a) is to provide a uniform body of federal law that is consistently applicable to "disputes arising out of labor contract" (*Allis-Chalmers Corp. v. Lueck*, 471 U.S. [202] 209), that section must also apply to suits seeking to invalidate contracts on the same ground.
>
> Any different result would mean that the forum for the dispute, and possibly the applicable law, would depend on which of the parties to a collective agreement was at the top of the caption in a case in which fraud was the decisive issue. [U.S. Br. at 6, 11.]

And the Solicitor General was also of the view that

> The courts of appeals are moving toward a consensus that Section 301(a) confers jurisdiction to adjudicate a claim that a collective bargaining agreement is invalid as well as a claim that a valid agreement has been breached; those circuits that have not yet adopted this view are likely to do so when they reconsider the issue. [*Id.* at 7.]

The Solicitor General's power of legal analysis has proved greater than his power to divine the future.

In the instant case, the Ninth Circuit has *widened* the split in the circuits that existed at the time of *Rozay's II*, by holding that there is *both* a § 301 cause of action *and* a state law cause of action for fraud in the negotiation of a collective bargaining agreement.[5]

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[5] Indeed, the majority opinion in this case leads to precisely the anomaly the Solicitor General thought had been eliminated by the *Rozay's II* opinion: Presumably, collective bargaining agreement validity issues, including fraud issues, will continue to be governed

Of equal importance the Sixth Circuit, one of the courts of appeals that the Solicitor General predicted would abandon its earlier view and join the emerging "concensus" has instead widened the circuit split in the opposite direction. For the Sixth Circuit has now ruled that contract formation questions—including those turning on fraud—are *never* within § 301's purview. *Huessner, supra,* 887 F.2d at 676.

Given these developments it is plain that the time has come for this Court to settle this circuit conflict.

2. There is another line of court of appeals decisions that bears upon the issue of whether federal law or state law—or both—governs where the validity of a collective bargaining agreement is challenged on the basis of fraud in the collective bargaining negotiation process. These decisions hold that state law claims based on alleged fraudulent misconduct in the negotiation process are ordinarily preempted by § 8 of the National Labor Relations Act. *Parker v. Connors Steel Co.*, 855 F.2d 1510 ((11th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989); *Serrano v. Jones & Laughlin Steel Co.*, 790 F.2d 1279 (6th Cir. 1986). *See also Kolentus v. Avco Corp.*, 798 F.2d 949, 960-62 (7th Cir. 1986), *cert. denied*, 479 U.S. 1032 (1987).

These NLRA preemption cases have involved situations in which employees have sought relief against their employer's alleged fraud in negotiating a collective bargaining agreement. In each instance, the court of appeals has

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by § 301 federal common law when the issues arise as a *defense* to an action to enforce a collective bargaining agreement. Yet, federal and state law on fraudulent inducement issues vary on such basic questions as whether *international* misrepresentation is required or not. Thus, as we have argued in text, under the instant decision a collective bargaining agreement could be declared valid under federal law in a § 301 enforcement action, while the same agreement is held invalid, and the plaintiff in the § 301 enforcement action held liable in damages, in a state law fraud suit brought by the other party.

held that any state law cause of action for fraud that would otherwise inure to the employees' benefit is preempted by the NLRA. These courts have reasoned that the gravamen of the complaint—that the employer made intentional, material misrepresentations in collective bargaining negotiations—is nothing more than an allegation of bad faith bargaining, directly proscribed by NLRA §§ 8(a)(5) and 8(b)(3), 29 U.S.C. §§ 158(a)(5) and (b)(3). *Parker v. Connors Steel Co., supra,* 855 F.2d at 1516; *Serrano v. Jones & Laughlin Steel Co., supra,* 790 F.2d at 1286-87; *see also Kolentus v. Avco Corp., supra,* 798 F.2d at 960-62.

In so ruling, the *Parker* and *Serrano* courts did not directly address the question whether a federal cause of action for fraud during the collective bargaining negotiation process is available under § 301. *Compare Rozay's II, supra,* 850 F.2d at 1326 (even where the alleged fraud in the inducement of a collective bargaining agreement is an unfair labor practice, federal district courts have concurrent jurisdiction under § 301).[6] But the *Parker* and *Serrano* courts did address the general question whether Congress intended the law governing collective bargaining negotiations to be uniform nationwide, or instead intended to allow for diversity based on local law.

In both instances, the conclusion was that the process of negotiating a collective bargaining agreement is one as to which federal interests are paramount, and as to

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[6] However, in light of *Huessner, supra,* it is now clear that in the Sixth Circuit, no such cause of action is available. Thus, in that court a litigant who claims that a collective bargaining agreement is void because of fraud in its inception may have only the option of filing an unfair labor practice charge. *See* 887 F.2d at 676.

In contrast, in the Ninth Circuit, such a litigant always has *either* a state or a federal judicial cause of action for damages, and in many instances—as in this case—may have both.

which the conflict and confusion inherent in permitting state causes of action cannot be permitted. *Serrano*, 790 F.2d at 1288 ("[w]hile the state has an interest in protecting its citizens from misrepresentations, we believe this interest is properly overridden by the need to enforce a uniform federal labor law"); *Parker*, 855 F. 2d at 1518 (state law fraud claims regarding collective bargaining negotiations are impermissible because, among other reasons, such claims "may subject the employer to conflicting substantive rules."); *see also Kolentus*, *supra*, 798 F.2d at 961.

In contrast, under the Ninth Circuit decision here, the legality of collective bargaining negotiations, the enforceability of the resulting agreements, and the remedies for engaging in improper bargaining conduct will *not* be governed by a uniform national rule. Aside from the obligation created by the § 301 preemption doctrine, the states, after all, have no independent obligation to develop their own law governing the application of fraud concepts to collective bargaining negotiations with an eye toward the harmonious development of the federal labor laws.[7]

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[7] For purposes of this petition, we do not take issue with the Ninth Circuit's conclusion that *Parker* and *Serrano* are not directly relevant here because in those cases, unlike this one, there was a traditional NLRA § 9(a) bargaining relationship, and §§ 8(a)(5) and 8(b)(2) therefore apply with full force. Pet. App. 10a-12a.

We do note, however, that, contrary to the Ninth Circuit's conclusion, the agreement that the Wilsons signed *did* on its face cover the working conditions of any employees the Wilsons might hire, and for that reason *was*, by definition—whatever it may have been called—a prehire agreement in the construction industry, valid under NLRA § 8(f), 29 U.S.C. § 158(f). *See John Deklewa & Sons*, 282 NLRB No. 184 (1987), *enforced* 843 F.2d 770 (3d Cir.), *cert. denied*, 488 U.S. 889 (1988). While *Deklewa* holds that there is no federal obligation to bargain for § 8(f) agreements (and therefore, apparently, no obligation to bargain in good faith), that decision does not suggest that the *states* may impose upon the parties to § 8(f) negotiations the substantive bargaining obliga-

The net result of the opinion below, then, is to create a regime under which the enforceability of a *single collective bargaining agreement* covering employees in several states can vary from state to state, depending upon the vagaries of the state law of fraud, and through which each state can substitute its own incompatible legal standards governing collective bargaining negotiations for the substantive standards established as part of the national labor policy.[8]

This result is in direct conflict with the premise of *Parker* and of *Serrano* that the negotiation of collective bargaining agreements is an area in which uniform federal law must be paramount. And, as we now develop, this result is also in direct conflict with this Court's cases under § 301 itself, which also stress that a uniform federal law is essential with regard to the collective bargaining negotiation process.

II. THE UNIFORM FEDERAL COMMON LAW OF COLLECTIVE BARGAINING AGREEMENTS DEVELOPED UNDER § 301 APPLIES TO ALL QUESTIONS CONCERNING THE ENFORCEMENT AND EFFECT OF SUCH AGREEMENTS, AND NOT ONLY TO THE INTERPRETATION OF CONCEDEDLY VALID AGREEMENTS

The Ninth Circuit proceeded on the premise that while the § 301 federal common law developed pursuant to *Lincoln Mills*, *supra*, covers the formation, the interpretation and the enforcement of collective bargaining agreements, that federal law preempts state law *only*

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tions the Labor Board has declined to impose. *See Deklewa*, *supra*, 282 NLRB at 1386-89. To the contrary, this Court has squarely decided that the states may *not* enter "into the substantive aspect of the bargaining process to an extent Congress has not countenanced;" that process is "not to be regulable by States any more than by the NLRB." *Machinists v. Wisconsin Emp. Rel. Comm'n*, 427 U.S. 132 (1976).

[8] Indeed, that approach led, in this very case, to applying different legal standards to two statements that were part of a single collective bargaining negotiation conversation.

where the legal dispute concerns in whole or part the meaning of a discrete provision of such an agreement.

That premise is doubly flawed. There is no basis for any such distinction in this Court's jurisprudence. Equally to the point, such a rule would undermine the primary goal of § 301 as stated by this Court: *viz.*, the development of a uniform nationwide law governing collective bargaining agreements, based on national labor policy as defined by the applicable federal statutes and regulations.

1. Contrary to the Ninth Circuit's supposition, this Court has made it clear that the scope of § 301's federal common law and the area of federal exclusivity *are* coextensive.

For example, *Dowd Box v. Courtney*, 368 U.S. 502 (1962), raised the question—akin to the question raised here—whether a collective bargaining agreement is unenforceable because the employer's bargaining representative who signed the agreement lacked the authority to do so. It was in that context—*viz.*, the context in which the Ninth Circuit now maintains that there is *no* need for uniform federal law consistent with the national labor policy—that *Dowd Box* stated that § 301 creates "an all-embracing body of federal law" for "the *enforcement* of agreements within its ambit." 368 U.S. at 506, 507 (emphasis supplied). And it was in that context as well that *Dowd Box* explained the origins and purpose of § 301 in terms entirely inconsistent with the Ninth Circuit's conclusion in this case:

> The Labor Management Relations Act of 1947 represented a far-reaching and many-faceted legislative effort to promote the achievement of industrial peace *through encouragement and refinement of the collective bargaining process.* It was recognized from the outset that such an effort would be purposeless unless both parties to the collective bargaining agreement would have reasonable assurance that *the con-*

> *tract they had negotiated would be honored.* Section 301(a) reflects congressional recognition of the vital importance of *assuring the enforceability of such agreements.* [368 U.S. at 509 (emphasis supplied).][9]

The fundamental congruence between this uniformity concern and the affirmative coverage of § 301 was made even more plain, in language that could hardly be more definite, in *Local 174 Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962):

> The dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount *in the area covered by the statute.* Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of *Lincoln Mills*, requiring issues raised in suits *of a kind covered by § 301* to be decided according to the precepts of federal labor policy. [*Id.* at 103 (emphasis supplied).]

And the *Lucas Flour* Court went on to explain that "the area covered by the statute," as to which "the need for a single body of federal law [is] particularly compelling," 369 U.S. at 104, centers upon the process of negotiating collective bargaining agreements:

> The ordering and adjusting of competing interests through a process of free and voluntary collective

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[9] The Ninth Circuit ruling in this case, in contrast, intrudes state law deeply into the "collective bargaining process." And that ruling removes any federal "assurance" of enforcement of the agreements negotiated through that process. For the decision below permits parties to collective bargaining agreements to attack the validity of those agreements under state law as long as the premise for their attack is what was said and done in the negotiation of the agreement and not the content of the agreement itself.

For example, authority issues such as those involved in *Dowd Box* itself can ordinarily be determined without regard to any agreement actually negotiated by the putative agent. Under the Ninth Circuit approach, apparently, a state could establish rules regarding the authority of agents to negotiate collective bargaining agreements and provide a cause of action for rescission and damages with respect to any agreement not negotiated according to those rules.

> bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy. With due regard for the many factors which bear upon competing state and federal interests in this area . . . we cannot but conclude that in enacting § 301 Congress intended doctrines of federal labor policy uniformly to prevail over inconsistent local rules. [*Id.*].[10]

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[10] If the states are free to impose their own substantive standards to police "the process of free and voluntary collective bargaining" and to determine the validity of the agreements the process is designed to facilitate, the same agreement could be valid in some states and invalid in others and the grounds for judging validity could be consistent with federal law in some states and not in others.

For example, under California law, negligent as well as intentional misstatements in the negotiation of a contract can support a tort cause of action and result in voiding the agreement, as well as in substantial damages. *Cicone v. URS Corp.*, 185 Cal. App. 3d 194 198-99 (1986); Cal. Civ. Code § 1710 subdiv. 2. The NLRA, in contrast, establishes a "good faith" standard to govern collective bargaining negotiations (§§ 8(a)(3) and 8(d), 29 U.S.C. §§ 158(a)(3) and (d)). The NLRA standard does not penalize unintentional, albeit negligent, misstatements in the bargaining process. *See, e.g., Eltec Corp.*, 286 NLRB 890, 893 & n.15 (1987); *Allbritton Communications*, 271 NLRB 201, 205 & n.13 (1984), *enforced*, 766 F.2d 812 (3d Cir. 1985), *cert. denied*, 474 U.S. 1081 (1986); *Chevron Chemical Co.*, 261 NLRB 44, 46 & n.10 (1982) (all holding that the objective "reasonableness" of parties' bargaining positions is irrelevant under the Act and that only statements and positions which are "so predictably unacceptable as to warrant the evidentiary conclusion that they have been proffered in bad faith" give rise to liability under the Act). If employers and unions can be held liable under state law for compensatory damages due to negligent misstatements in the bargaining process, their bargaining representatives might well curb the free interchange of views at the bargaining table for fear of incurring substantial liability thereafter because of an unintentional factual misstatement.

Even if one assumes that the bargaining process in this case was not directly covered by the NLRA standard because the agreement was entered under NLRB 8(f), imposing as to such bargaining relationships a standard *stricter* than that applicable where Congress did regulate the bargaining process would surely conflict

The *Lucas Flour* Court did, to be sure, view the legal concepts used in construing the terms of an agreement as *within* the area of uniform federal law covered by § 301. 369 U.S. at 103. But *Lucas Flour* emphasized that the *reason* that § 301's rules of contract interpretation must be uniform is that conflicting interpretive rules could impede the negotiation process. *Id.* (conflicting interpretive rules "would inevitably exert a disruptive influence upon . . . the negotiation . . . of collective agreements" by requiring the parties "to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract.")

In other words, questions that turn on contract interpretation are only a subset of the questions that can arise in cases concerning contract enforcement and that trigger the need to protect the process of negotiating collective bargaining agreements from nonuniform legal rules.

Here, the dispute between the parties centers *directly* upon the manner in which collective bargaining negotiations were conducted, rather than indirectly, as in cases concerning discrete contract construction issues. Thus, in cases such as this one and *Dowd Box*, the need for uniformity in the governing law is, if anything, *more* acute than in cases concerning a limited dispute over the meaning of particular terms of the agreement. *See also Smith v. Evening News Assn.*, 371 U.S. 195, 200 (1962).

2. This Court's more recent § 301 preemption cases are squarely rooted in the seminal cases discussed above. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Electrical Workers v. Hechler*, 481 U.S. 851 (1987); *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987); *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988); and *United Steelworkers v. Rawson*,

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with the national labor policy. See n.7 p. 14 *supra*. Indeed, the effect would be to *discourage* employers and unions in the construction industry from voluntarily negotiating freely toward the end of creating prehire agreements.

—— U.S. ——, 110 S.Ct. 1904 (May 14, 1990) (all recounting the evolution of the § 301 preemption doctrine from *Lincoln Mills* to *Lucas Flour*).

Far from superseding the earlier precedents, as the Ninth Circuit supposed, the *Allis-Chalmers* line of cases simply elucidate the application of the principles developed in those cases to a distinct class of disputes different from the dispute presented here: *viz.*, contract disputes that are *not* between the direct parties to the collective bargaining agreement themselves, and do *not* directly concern the validity or enforcement of that agreement.[11]

The most recent of these § 301 preemption cases, *United Steelworkers v. Rawson, supra,* summarizes the history of § 301 preemption and the general standard delineating the area within which this uniform federal law applies in a way entirely consistent with the seminal cases, and entirely inconsistent with the much more limited view taken by the Ninth Circuit here:

> Over thirty years ago, this Court held that § 301 not only provides the federal courts with jurisdiction over controversies involving collective-bargaining agreements but also authorized the courts to fashion "a body of federal law for *the enforcement of these collective bargaining agreements.*" *Textile Workers v. Lincoln Mills* . . . 353 U.S. [at 451]. Since then, the Court has made clear that § 301 is a potent source of federal labor law, for though state courts have concurrent jurisdiction over *controversies involving collective-bargaining agreements, Charles Dowd Box Co. v. Courtney* . . ., state courts must apply federal law in deciding *those claims.* . . . State law is thus "pre-empted by § 301 in that only

[11] *Allis-Chalmers, supra, Caterpillar Inc. v. Williams, supra,* and *Lingle, supra,* all involved suits by individual empoyees against their employer. *Hechler* and *Rawson* both involved suits by individual employees against the union representing those employees for collective bargaining purposes. In none of these cases did the cause of action, in terms, concern the propriety of the bargaining process or the validity of the resulting collective bargaining agreement.

> the federal law fashioned by the courts under § 301 governs the interpretation *and application* of collective bargaining agreements. . . . [110 S. Ct. at 1909.]

This case is, most assuredly, one in which a party to the collective bargaining agreement is suing the other party claiming that the agreement is entirely void, and that the defendant owes the plaintiff damages because of an attempt to enforce the invalid agreement. As such, the case is on its face a "controversy" between the parties to the collective bargaining agreement assuredly "involving that agreement" and its "enforcement" and "application."

In describing the more recent § 301 preemption cases, moreover, *Rawson* makes clear repeatedly that the general standard for determining whether state law is preempted is whether the state cause of action is "without existence independent of the agreement," *not* whether there is a need to construe the meaning of the agreement's terms in the course of considering the state law claim. 110 S. Ct. at 1909-10 (describing *Allis Chalmers, supra*); *see also id.*, describing *Hechler, supra* (whether the state law duty relied upon "was one without existence independent of the collective-bargaining agreement" or "sufficiently independent of the collective-bargaining agreement"); *id.* at 1910 (issue is whether "respondents' tort claim can[] be described as independent of the collective bargaining agreement:); *see also id* at 1915 (Kennedy, J., dissenting) (agreeing that "a State cannot circumvent our decisions in *Lingle*, *Hechler*, and *Allis-Chalmers*, by the mere 'relabeling' as a tort claim an action that in law is based upon the collective bargaining *process*" (emphasis supplied).

The employer's fraud claim in this case is *directly* "based upon the collective bargaining process" and, as a claim that would not have arisen at all had there been no collective bargaining agreement in the first place, is definitely not "independent of the collective bargaining agreement."

3. In concluding, to the contrary, that the § 301 common law of labor contracts supersedes state law only with respect to cases involving the meaning of concededly valid contract terms, the Ninth Circuit relied on a few sentences in *Allis-Chalmers* and in *Lingle*. Pet. App. 6a-7a. In context, however, it is plain those two cases stressed the need for federal uniformity in giving meaning to discrete contract clauses because the *facts* of those cases implicated only that aspect of § 301 jurisdiction. We submit that those decisions can not fairly be read to suggest—contrary to the earlier decisions summarized above *and* to the later decision in *Rawson*—that only in the area of disputes over the meaning of concededly valid contractual language does the policy of federal uniformity under § 301 hold sway.

For example, *Allis-Chalmers*, *supra*, begins by describing the area of federal uniformity broadly:

> [Q]uestions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. . . . [471 U.S. at 211.] [12]

See also id. at 209 ("§ 301 [is] a congressional mandate to . . . fashion a body of federal common law to be used to address disputes *arising out of labor contracts.*"); *id.* at 210-11 (§ 301's policies require that "'the relationships created by [a collective bargaining agreement] be defined by application of 'an evolving federal common law grounded in national labor policy . . .'"); *id.* at 213 (general preemption standard is whether "the tort intrin-

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[12] Here, the Wilsons' contention was that they cannot be taken to have entered into any agreement at all, because they were misinformed, and that the breach of the agreement should therefore give rise to no remedies in favor of the employees but, instead, should allow the employer to claim damages for the injuries caused in defending against the breach.

sically relates to the nature and existence of the contract.")

When the *Allis-Chalmers* Court turned to the particular cause of action involved there—an action under state tort law by an employee against his employer for bad faith performance of the labor contract—the Court quite naturally focused upon whether that cause of action "ultimately depends upon the terms of the agreement between the parties." *Id.* at 216. But the Court was careful, at the end of the opinion, to "emphasiz[e] the narrow scope of the conclusion we reach today," and to explain quite clearly that that conclusion was not meant to circumscribe "the full scope of the preemptive effect of federal labor-contract law", but rather leaves other aspects of § 301 preemption "to be fleshed out on a case-by-case basis." *Id.* at 220.

Similarly, *Lingle* was a case in which the *only* possible connections between the state law cause of action and the § 301 law of collective bargaining agreements were that the plaintiff was an employee covered by such an agreement, and that the issues in the case concerned a matter subject to collective bargaining and often covered by collective agreements; *viz.*, the propriety of an employment termination decision. The suit was *not* one between the parties to the collective bargaining agreement, and did *not* concern directly *any* aspect of the agreement, its formation, or its enforcement. It was in this narrow context that this Court stated that § 301 is preemptive "only if . . . application [of state law] requires the interpretation of a collective-bargaining agreement." 486 U.S. at 413. *Compare* Pet. App. 7a, relying on that statement, without regard to its context, as controlling here.

But, as both the pre-*Lingle* jurisprudence of this Court and the broader approach taken later by the *Rawson* Court attest, this portion of *Lingle* was necessarily limited to cases involving the kind of more remote connec-

tion to the collective bargaining process involved in *Allis-Chalmers* and its progeny. *Lingle* does *not* stand in splendid isolation and does *not* stand for a principle applicable to situations, like this one, in which questions concerning the negotiation and effectiveness of a collective bargaining agreement are *directly at stake*. Indeed, as Judge Canby noted in dissent below, there is nothing in *Lingle* to suggest that by "interpretation" of the agreement, this Court had in mind only differing constructions of concededly valid provisions, as opposed to differing views about whether the provision has any valid application at all.

Allis-Chalmers, then, holds it *sufficient* for § 301 preemption that the "state law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." 471 U.S. at 220. But the *Allis-Chalmers* line of cases does *not* hold that kind of relationship between the collective bargaining agreement and the state cause of action to be *necessary* for the federal uniformity policy that underlies § 301 jurisprudence to become applicable. And this Court's § 301 preemption decisions as a whole make clear that the provision's "substantive principles of federal law must be paramount in the area covered by the statute." *Lucas Flour, supra*, 369 U.S. at 103.

In sum, the Ninth Circuit's conclusion that state law standards can govern the collective bargaining negotiation process itself and determine the validity of a resulting collective bargaining agreement as long as the court can proceed without considering the meaning of discrete terms of the agreement profoundly misunderstands this Court's § 301 decisions and even more profoundly threatens the proper effectuation of the federal labor laws. For this reason, too, this case warrants this Court's review.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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91-4

No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL NO. 12, AFL-CIO,
Petitioner,

v.

CARROLL WILSON, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-6559

D.C. No. CV-84-2476

OPERATING ENGINEERS PENSION TRUST, et al.,
Plaintiffs,

v.

CARROLL E. WILSON and PATRICIA J. WILSON,
individually and dba WILSON EQUIPMENT, a partnership,
Defendants-Third Party
Plaintiffs-Appellees,

v.

INTERNATIONAL UNION OF
OPERATING ENGINEERS LOCAL NO. 12, AFL-CIO,
Third-Party Defendants-
Appellants.

Appeal from the United States District Court
for the Southern District of California
Rudi M. Brewster, District Judge, Presiding

Argued and Submitted
October 31, 1989—Pasadena, California

Filed October 2, 1990

Before: Procter Hug, Jr. and William C. Canby, Jr., Circuit Judges, and David A. Ezra,* District Judge.

Opinion by Judge Hug; Dissent by Judge Canby

Anthony R. Segall, Reich, Adell & Crost, Los Angeles, California, for a third party defendants-appellants.

Richard M. Freeman, Dennis Childs, Sheppard, Mullin, Richter & Hampton, San Diego, California, for the defendants-third party plaintiffs-appellees.

OPINION

HUG, Circuit Judge:

This case involves an action brought by various union welfare trust funds against the Wilsons, alleging that they failed to pay fringe benefit contributions under a collective bargaining agreement. The Wilsons answered, contending that the contract was void because the union business agent had induced Carroll Wilson to sign the agreement by fraudulent representations. The Wilsons also filed a third-party complaint against appellant International Union of Operating Engineers, Local No. 12 ("Local 12") on various state and federal law theories. After a jury responded to interrogatories and rendered a special verdict, the district judge entered judgment for the Wilsons against the union trust funds, invalidating the collective bargaining agreement and assessing attorneys' fees. A judgment against Local 12 for damages on a state law claim for fraudulent inducing the execution of the agreement, and a judgment against both for attorneys' fees was entered. Local 12 appeals; the trust funds do not. The principal issue in this appeal is whether the Wilsons' claim against Local 12 for fraudulent induce-

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* The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

ment to enter into a contract is preempted by section 301 of the National Labor Relations Act. We hold it is not and affirm the judgment.

I. *FACTS*

The Wilsons are owners of Wilson Equipment Company. Although Wilson Equipment Company was a non-union shop, Carroll Wilson had been a member of Local 12 for five years prior to the dispute at issue. In May, 1982, Carroll Wilson, acting in his capacity as co-owner of Wilson Equipment Company, was removing dirt from a local jobsite. Wilson had secured permission from the project's general contractor to remove the dirt from the jobsite. While in the process of removing the dirt, Wilson was approached by Hoss Kinsey, a business representative of Local 12. The conversation that ensued forms the basis of this litigation.

It is undisputed on appeal that Kinsey told Wilson that everyone working at the jobsite had to be "union," and that Wilson could not continue removing the dirt unless he signed certain forms. Wilson also asked Kinsey if signing the forms would change his status with Local 12. Kinsey told Wilson it would not. Wilson then signed the forms on the hood of Kinsey's car without reading them.

Both of Kinsey's statements were false. Wilson did not need to sign an agreement with Local 12 in order to continue removing the direct from the jobsite. Further, the agreement signed by Wilson did, in fact, change his status with the union. The agreement made Wilson a party to an owner-operator agreement, requiring the Wilsons to pay their employees union wages and contribute to employee benefit trust funds. An owner-operator agreement allows a member of Local 12 to operate a piece of heavy equipment to which he holds title. When the owner-operator hires other employees, the agreement operates as a short-form collective bargaining agreement. At the time Wilson signed the owner-operator agreement, he had three full-time employees.

The Wilsons did not make the contributions to the trust funds as required by the agreement. As a result, the Operating Engineers Pension Trust, Operating Engineers Health and Welfare Fund, Operating Engineers Vacation-Holiday Savings Trust, and Operating Engineers Training Trust ("the Trusts") brought an action against the Wilsons to collect the delinquent contributions. The Wilsons answered and filed a third-party complaint against Local 12 and Kinsey. The claims against Kinsey were dismissed by stipulation of the parties before trial.

Local 12 filed various motions, seeking dismissal of the Wilsons' fraud claim because it was preempted by federal labor law. In ruling on Local 12's preemption motions, the district court distinguished between the two misrepresentations made by Kinsey to Wilson during their conversation at the jobsite. The court found that Kinsey's first statement, that Wilson had to be "union" in order to remove dirt from the jobsite, was properly characterized as fraud in the inducement. The court went on to hold that the Wilsons' action for fraud in the inducement was not preempted by federal labor law and found this claim to be a proper subject of a pendent state law claim. The court next characterized Kinsey's second statement, that the agreement would not affect Wilson's status with the union, as fraud in the execution. Unlike the Wilsons' fraud in the inducement claim, the district court found that this claim was preempted by section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a) and, thus, was treated as a section 301 claim.

The jury was instructed accordingly and was given a series of interrogatories and a special verdict, upon which the judge based his judgment. The responses to the interrogatories, pertinent to this appeal, were as follows:

> QUESTION NO. 5: Do you find that Carroll Wilson was induced to sign the "Owner-Operator Short Form Collective Bargaining Agreement" by an *intentional* false representation knowingly made by

Earvin Kinsey, or by another person in his presence and intentionally adopted by Earvin Kinsey with knowledge of its falsity, that Carroll Wilson could not remove dirt from the site unless he signed the agreement? (Emphasis in original.)

Answer: YES

QUESTION NO. 6. Do you find that Carroll Wilson actually and justifiably relied on the representation you have found in Question No. 5 above?

Answer: YES

QUESTION NO. 8. Do you find that the Wilsons sustained damages as a proximate result of the conduct you have found in Question No. 5 above in any one or more of the following categories: lost time defending trusts claims, emotional distress, indemnity for trusts claims, or attorney's fees in defense of trusts claims?

Answer: YES

QUESTION NO. 9. What damages do you find will compensate the Wilsons for the conduct you have found in Question No. 5 above? This amount should only include lost time and emotional distress, if any, sustained by the Wilsons. (The court will determine any award for indemnity and/or attorney's fees, depending upon your answers to these questions.)

Answer: $200,000

The district judge entered a judgment against the Trusts on their claim for contributions to the employee benefit funds, and a judgment of $200,000 on the Wilsons' claim against Local 12 for fraudulent inducement. A judgment was also entered against the Trusts and Local 12 for $137,600 in attorneys' fees. The Trusts have not appealed the judgment against them. Local 12 appeals the judgment against it.

The claim, based upon Kinsey's statement that signing the forms would not change his status with Local 12, categorized as a fraud in the execution claim, was held to be preempted by section 301 and was also submitted to the jury with interrogatories under pertinent instructions. We need not delve into the issues concerning this claim because the judgments entered by the district court were based upon the fraud in the inducement claim. Thus, we direct our attention to that claim.[1]

II. *DISCUSSION*

We consider whether the Wilsons' state tort claim for fraud in the inducement was preempted by federal labor law. We review this question of law *de novo*. *Bale v. General Tel. Co. of Cal.*, 795 F.2d 775, 778-79 (9th Cir. 1986).

1. *Section 301 Preemption*

Local 12 contends that the Wilsons' claim for fraud in the inducement was preempted by section 301 of the LMRA. It is well-settled that state law claims concerning conduct covered by the terms of a collective bargaining agreement are preempted by section 301 of the LMRA. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210 (1985). In *Lueck*, the Supreme Court framed the test for preemption of a state tort claim as whether the

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[1] We note that the award of attorneys' fees was joint and several against the trusts and Local 12. The award against the Trusts was based upon 29 U.S.C. § 1132(g)(1) (1988) and against Local 12 as consequential damages for the fraud. Although the court mentioned both fraud in the inducement and fraud in the execution in assessing the attorneys' fees, the difference in the fees, eliminating the alternate theory, would be de minimus. Furthermore, the damages award of $200,000 was based upon the special verdict of the jury, which was on the claim of fraudulent inducement. The award of the attorneys' fees would presumably follow the claim on which the $200,000 award was made. Local 12 does not contest the amount of the attorneys' fees nor the grounds upon which they were awarded.

tort "confers nonnegotiable state-law rights on employers or employees independent of any right established by contract." *Id.* at 213. More recently, the Court held that "application of state law is pre-empted by § 301 . . . only if such application requires the interpretation of a collective-bargaining agreement." *Lingle v. Norge Div. of Magic Chef Inc.*, 486 U.S. 399, 413 (1988).

Based upon these principles, the district court found that the Wilson's tort action for fraud in the inducement was not preempted by section 301 because it did not require reference to the owner-operator agreement signed by Wilson. We agree.

The Wilsons' action for fraud in the inducement is predicated upon Kinsey's assertion that Wilson had to sign the owner-operator agreement in order to continue removing dirt from the jobsite. To show fraud the Wilsons' had to put forth sufficient facts to prove "(1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage." *Cicone v. URS Corp.*, 183 Cal. App. 3d 194, 201, 227 Cal. Rptr. 887, 890 (Cal. Ct. App. 1986). *See also* Cal. Civ. Code § 1710 (West 1985). Each of these inquiries did not require interpretation of the collective bargaining agreement. Thus, as in *Lingle*, "the state-law remedy in this case is 'independent' of the collective-bargaining agreement in the sense of 'independent' that matters for § 301 pre-emption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement." *Lingle*, 486 U.S. at 407.[2] We therefore hold that Wilson's action for fraud in the inducement was not preempted by section 301 and was properly brought as a pendent state claim.

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[2] Such independence was not present in either *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993, 1001 (9th Cir. 1987) or *Bale*, 795 F.2d at 780. In both of these cases, resolution of the plaintiff's fraud claim required construing the relevant collective bargaining agreement.

Local 12 contends that the doctrine enunciated in *Lingle* is a mere benchmark for section 301 preemption and argues that section 301 preempts state law in all matters that pertain to the formation of collective bargaining agreements. This argument is not supported by the pronouncements of the Supreme Court.

In *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962), the Court focused on the terms of the collective bargaining agreement and emphasized that "[o]nce the collective bargain was made, the possibility of conflicting substantive interpretation . . . would tend to stimulate and prolong disputes as to its interpretation." In *Lueck*, the Court again focused on the terms of the collective bargaining agreement and evaluated whether "the tort claim was inextricably intertwined with consideration of the terms of the labor contract." *Lueck*, 471 U.S. at 213.

The *Lingle* decision continued to emphasize that it is the possible state interference with consistent *interpretation* of a collective bargaining agreement that evokes preemption. *Lingle*, 486 U.S. at 405-06. In reasoning that Lingle's tort action for retaliatory discharge was not preempted by section 301, the Court defined the boundaries of section 301 preemption, succinctly stating: "In sum, we hold that an application of state law is preempted by § 301 of the Labor Management Relations Act of 1947 only if such application requires the interpretation of a collective-bargaining agreement." *Id.* at 413.[3]

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[3] The Supreme Court's recent decision in *United Steelworkers of America v. Rawson*, 110 S. Ct. 1904 (1990) does not alter the application of *Lingle* to this case. In *Rawson*, a determination of the union's tort liability required reference to the collective bargaining agreement to determine the existence and scope of the union's duty. *Id.* at 1910-11. Here, in contrast, reference to the agreement is not necessary to determine the union's tort liability.

Local 12 also argues that our decision in *Rozay's Transfer v. Local Freight Drivers*, 850 F.2d 1321 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1768 (1989) compels us to find section 301 preemption. In *Rozay's*, the employer brought an action against the union alleging that the union fraudulently induced it to execute a collective bargaining agreement. *Id.* at 1323. The employer in *Rozay's*, unlike the Wilsons here, brought its' action pursuant to section 301 of the LMRA. *Id.* at 1325. Thus, there was no issue of whether a state action was preempted. The preemption issue in *Rozay's* was whether the action was in the exclusive jurisdiction of the NLRB and therefore preempted by the *Garmon* doctrine. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959). In holding that the district court had jurisdiction pursuant to section 301, we noted that "[s]ection 301, moreover, applies not only to suits for breach of a collective bargaining agreement once it is duly formed, but also to suits impugning the existence and validity of a labor agreement." *Rozay's*, 850 F.2d at 1326.

Thus, because we have held that an action for fraud in the inducement is cognizable under section 301, to contest the formation of an agreement, Local 12 contends that it necessarily follows that any fraud in the inducement is *only* cognizable under section 301. Local 12 maintains that a decision permitting the Wilsons to bring an action under state law, runs the risk of inconsistent adjudication and therefore conflicts with the uniformity rationale behind section 301 preemption.

While we agree that our holding that a plaintiff's tort action for fraud in the inducement may involve interpreting the same set of facts as a section 301 action, we find this to be entirely consistent with the Supreme Court's preemption decision in *Lingle*. As the Court stated in that opinion.

> [E]ven if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state

> law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for § 301 pre-emption purposes.

Lingle, 486 U.S. at 409-10 (footnote omitted).

While we agree with Local 12 that section 301 preemption is broadly defined, "there is nothing novel about recognizing that substantive rights in the labor relations context can exist without interpreting collective-bargaining agreements." *Lingle*, 486 U.S. at 411. We hold that the Wilsons' state tort claim for fraud in the inducement is not preempted by section 301 because it does not require reference to the collective bargaining agreement.

2. *Garmon Preemption*

Local 12 next claims that the district court lacked jurisdiction to hear the Wilsons' action for fraud in the inducement because the action was preempted by the doctrine announced by the Supreme Court in *Garmon*, 359 U.S. at 244-45. We disagree.

The *Garmon* doctrine provides that when an "activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board." *Id.* at 245. In *International Longshoremens Ass'n v. Davis*, 476 U.S. 380 (1986), the Court explained the standard to be applied in deciding whether an action is within the primary jurisdiction of the NLRB: " i]f the word 'arguably' is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his case is one that the [NLRB] could legally decide in his favor." *Id.* at 395.

Local 12 presents two reasons why the Wilsons' action for fraud in the inducement should be preempted under

the *Garmon* doctrine. First, Local 12 attempts to characterize the agreement Wilson signed at the jobsite as a pre-hire contract. Once the contract is so characterized, Local 12 relies on the NLRB's decision in *John Deklewa & Sons*, 282 NLRB No. 184 (1987), *enf'd* 843 F.2d 770 (3d Cir.), *cert. denied*, 109 S. Ct. 222 (1988), adopted by this court in *Mesa Verde Constr. v. Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124 (9th Cir. 1988) (en banc), for the proposition that the Wilsons' action may arguably be brought as a unfair labor practice. *Deklewa* held that a pre-hire contract may not be repudiated by an employer.[4] Local 12 alleges that an employer's inability to repudiate a pre-hire contract means that relief from enforcement of the pre-hire contract may arguably be brought as an unfair labor practice.

We need go no further in rejecting this claim than to note that the agreement signed by Wilson was not a pre-hire contract. The agreement was clearly entitled "Owner-Operator Short Form Collective Bargaining Agreement." The agreement ostensibly permitted Wilson to operate his own equipment as a member of Local 12. Its plain language does not support a characterization as a pre-hire contract. Finally, the agreement was presented to the jury as an owner-operator agreement, not as a pre-hire contract.

Local 12 next claims that Kinsey's assertion that Wilson had to sign the agreement was arguably an unfair labor practice, because it was a misrepresentation during contract negotiations in violation of section 8(b)(3) of the LMRA. 29 U.S.C. § 158(b)(3). We disagree. The facts here fail to reveal that Wilson and Kinsey were "bargaining" prior to Wilson signing the agreement on the hood of Kinsey's car.

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[4] On remand, and on petition for rehearing and rehearing *en banc*, we determined that this rule would not be applied retroactively. *Mesa Verde Const. v. Northern Cal. Dist. of Laborers*, 895 F.2d 516 (9th Cir. 1989).

A union cannot compel an employer to bargain for employees the union does not represent. *United Food & Commercial Workers Union v. Alpha Beta Co.*, 736 F.2d 1371, 1377 (9th Cir. 1984). Here, Local 12 did not represent a majority of the Wilsons' employees; nor, as noted above, is there support for a finding that the agreement was a pre-hire contract permitting Local 12 to bargain for the employees in the absence of majority support. LMRA, §§ 8(f), 9(a). In the absence of a recognized bargaining relationship, Kinsey's misrepresentation to Wilson at the jobsite is not arguably a violation of section 8(b)(3).[5]

We therefore find that the Wilsons' claim for fraud in the inducement was not within the primary jurisdiction of the NLRB and was not preempted.

III. *CONCLUSION*

The judgment against the Trusts was not appealed. The actions against Local 12 for fraudulent inducement to sign the forms was not preempted by the NLRA and is therefore affirmed.

AFFIRMED.

CANBY, Circuit Judge, dissenting:

Judge Hug has produced a well-crafted opinion in a difficult area of law, but I find myself compelled to dissent

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[5] Local 12 cites this court to three cases outside our circuit which held that the fraudulent inducement of a collective bargaining agreement is arguably an unfair labor practice. *See Parker v. Connors Steel Co.*, 855 F.2d 1510, 1515-18 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 2066 (1989); *Kolentus v. Avco Corp.*, 798 F.2d 949, 960-62 (7th Cir. 1986), *cert. denied*, 479 U.S. 1032 (1987); *Serrano v. Jones and Laughlin Steel Co.*, 790 F.2d 1279, 1283-88 (6th Cir. 1986). We do not disagree with these cases. In fact, we have similarly found that a misrepresentation at the bargaining table was an unfair labor practice. *See Rozay's*, 850 F.2d at 1325-1326. However, in all these cases the parties had a recognized bargaining relationship. Not so here.

from it. I do so because I believe that the Wilsons' state-law claim for fraud in the inducement of a collective bargaining agreement is preempted by section 301 of the LMRA, 29 U.S.C. § 185(a).

As the majority opinion recognizes, a claim for fraud in the inducement of a collective bargaining agreement *may* be brought under section 301, *Rozay's Transfer v. Local Freight Drivers, Local 208*, 850 F.2d 1321, 1326 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1768 (1989). The majority holds, however, that a state-law claim is not preempted simply because a section 301 claim could be brought on the same set of facts. The authority for this proposition is *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988).

It is true that, under *Lingle*, a state-law claim is not preempted simply because a section 301 claim could be brought that would address "precisely the same set of facts . . ." *Id.* at 410. But the state-law claim, to avoid being preempted, must be able to "be resolved without interpreting the [collective bargaining] agreement itself . . ." *Id.* In my view, the Wilsons' claim does not pass the test.

The viability of the Wilsons' fraud claim, as it was submitted to the jury, depended upon the Wilsons' having sustained damages as a result of the defendants' conduct "in any one or more of the following categories: lost time defending trusts claims, emotional distress, indemnity for trusts claims, or attorney's fees in defense of trust claim[s]" Special Jury Interrogatory No. 8, quoted in the majority opinion, p. ——. All four of these categories depends upon the *invalidity* of the collective bargaining agreement that Carroll Wilson signed. Certainly if he had entered a *valid* collective bargaining agreement, the Wilsons would have suffered no legally cognizable damages relating to the trusts' claims and their defense, because the claims would have been perfectly legitimate. Even the damages for emotional distress, under the facts

of this case, depend upon the invalidity of the collective bargaining agreement. This is not a case where, for example, a union agent placed a gun to the head of an employer and forced him to sign an agreement. In that situation, the assault itself causes emotional distress. On the present record, I do not see any evidence that the Wilsons were caused emotional distress because "Hoss" Kinsey told Carroll Wilson he had to sign the agreement in order to be permitted to remove dirt from the work site. The distress, as I understand it, followed from the claims and entanglements arising from the agreement itself—the claims by the trusts, the necessity of defending them, and the threat of financial liability. If the agreement was valid, that distress is not compensable.

When a state claim cannot succeed unless the state court determines that a collective bargaining agreement is invalid, that state claim is not "independent" of the collective bargaining agreement within the meaning of *Lingle*. *Lingle* establishes that a state claim is not independent when it requires construction of the collective bargaining agreement. *Id.* at 407. To hold that a collective bargaining agreement means nothing—that it is invalid—is the most radical form of construction. Our cases implicitly acknowledge that fact when they hold that a district court has the power, in a suit under section 301, to determine the validity of a labor contract that is under attack on grounds of fraud. *See Rozay's Transfer*, 850 F.2d at 1326; *Operating Engineers Pension Trust v. Gilliam*, 737 F.2d 1501, 1503-05 (9th Cir. 1984). The Supreme Court operated on the same assumption when it held that state-law claims based on individual employment contracts were not preempted because "[s]ection 301 says nothing about the content *or validity* of individual employment contracts." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394 (1987) (emphasis added).

Lingle involved a state claim for retaliatory discharge of a worker for filing a worker's compensation claim.

The worker could have sued under section 301 for discharge in violation of an applicable collective bargaining agreement. That fact was not enough to cause preemption of the state-law claim because the state law claim in no way depended on the collective bargaining agreement; indeed, the agreement was irrelevant to it. *Lingle*, 486 U.S. at 407. Here, however, the entire claim requires an adjudication that the collective bargaining agreement is invalid. That is a question of federal law, *Rozay's Transfer*, 850 F.2d at 1326, and falls, I submit, within the category of contract interpretation. When the state creates a right that is applicable only under a particular construction of a collective bargaining agreement, it is preempted. *Lingle*, 486 U.S. at 408 n.7.

Whether a collective bargaining agreement is valid, and what types of conduct may vitiate an otherwise valid agreement, are matters that ought to be governed by uniform federal law. *See Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962) ("The dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute"). That principle is inherent in the concept of the federal common law of collective bargaining agreements that was launched in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 451 (1957). In prior cases we have wrestled with the question whether a court that is asked to determine the validity of a collective bargaining agreement under section 301 must yield to the primary jurisdiction of the National Labor Relations Board, *see, e.g., Rozay's Transfer*, 850 F.2d at 1326 (court may decide validity under § 301); *International Brotherhood of Electrical Workers, Local 532, v. Brink Construction Co.*, 825 F.2d 207, 212 (9th Cir. 1987) (same), but we have never entertained the notion that it would be proper for such a question to be decided as a matter of *state* law. Yet that is what has happened in this case, because the entire state-law claim depends upon an implicit threshold

determination that the collective bargaining agreement signed by Carroll Wilson was invalid. Believing that such a determination may only be made as a matter of federal law, I would reverse the decision of the district court and would hold that the Wilsons' state-law claim is preempted by section 301.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-6559
D.C. No. CV-84-2476

OPERATING ENGINEERS PENSION TRUST, *et al.*,
Plaintiffs,

v.

CARROLL E. WILSON and PATRICIA J. WILSON,
individually and dba WILSON EQUIPMENT, a partnership,
Defendants-Third-Party
Plaintiffs-Appellees,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL NO. 12, AFL-CIO,
Third-Party Defendants-
Appellants.

Appeal from the United States District Court
for the Southern District of California

ORDER

[Filed Feb. 26, 1991]

Before: HUG and CANBY, Circuit Judges, and EZRA,* District Judge.

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* The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

Upon due consideration, Judges Hug and Ezra have voted to deny the petition for rehearing, and Judge Canby has voted to grant the petition for rehearing. Judges Hug and Canby have voted to reject the suggestion for a rehearing en banc, and Judge Ezra has recommended rejection of the suggestion.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 84-2476-B(M)

OPERATING ENGINEERS PENSION TRUST, OPERATING ENGINEERS HEALTH AND WELFARE FUND, OPERATING ENGINEERS VACATION-HOLIDAY SAVINGS TRUST, and OPERATING ENGINEERS TRAINING TRUST,
Plaintiffs,

vs.

CARROLL E. WILSON and PATRICIA J. WILSON, individually and dba WILSON EQUIPMENT, a partnership,
Defendants.

SPECIAL VERDICT

[Filed Jan. 25, 1988]

We, the jury in the above-entitled action, find our special verdict on the following questions submitted to us as follows:

QUESTION NO. 1: Do you find that the "Owner-Operator Short Form Collective Bargaining Agreement" which was signed on May 14, 1982, was based on mutual assent of the parties, as defined in these instructions, which is to say that Carroll Wilson either knew, or had a reasonable opportunity to know, the essential terms of the agreement before filling in the blanks and signing documents (regardless of whether he chose to make use of any such opportunity)?

Please answer "yes" or "no".

Answer: No

If you answered Question No. 1 "no", go directly to Question No. 5. If "yes", please answer Question No. 2.

QUESTION NO. 2: Do you find that no contractual relationship was formed on May 14, 1982, because of an *intentional* misrepresentation by Local 12's agent, Earvin Kinsey, which was reasonably relied upon by Carroll Wilson, regarding the essential terms of the document presented for his signature?

Please answer "yes" or "no".

Answer: _____

If you answered Question No. 2 "yes", go directly to Question No. 5. If "no", please answer Question No. 3.

QUESTION NO. 3: Do you find that no contractual relationship was formed on May 14, 1982, because of a *negligent* misrepresentation by Local 12's agent Earvin Kinsey, which was reasonably relied upon by Carroll Wilson regarding the essential terms of the document presented for his signature?

Please answer "yes" or "no".

Answer: _____

If you answered Question No. 3, "yes", go directly to Question No. 5. If "no", please answer Question No. 4.

QUESTION NO. 4: Do you find that the Wilsons repudiated the agreement at any of the suggested dates before July 31, 1984?

Please answer "yes" or "no".

Answer: _____

4(a) If you answered Question No. 4 "yes", what date do you find that the Wilsons repudiated the agreement?

(date)

_____

The court will determine the amount of plaintiffs' judgment, if any, based on your answers to these questions and the stipulations as to amounts described in the instructions.

QUESTION NO. 5: Do you find that Carroll Wilson was induced to sign the "Owner-Operator Short Form Collective Bargaining Agreement" by an *intentional* false representation knowingly made by Earvin Kinsey, or by another person in his presence and intentionally adopted by Earvin Kinsey with knowledge of its falsity, that Carroll Wilson could not remove dirt from the site unless he signed the agreement?

Please answer "yes" or "no".

Answer: Yes

If you answered Question No. 5 "no", go directly to Question No. 12. If "yes", please answer Question No. 6.

QUESTION NO. 6: Do you find that Carroll Wilson actually and justifiably relied on the representation you have found in Question No. 5 above?

Please answer "yes" or "no".

Answer: Yes

If you answered Question No. 6 "no", go directly to Question No. 12. If "yes", please answer Question No. 7.

QUESTION NO. 7: Do you find that the Wilsons waived (gave up) their right to damages or indemnity for any intentional fraud in the inducement, if any, by reason of any voluntary compliance with the owner-operator agreement after they knew of the alleged intentional fraud, barring and estopping them from obtaining damages or indemnity?

Please answer "yes" or "no".

Answer: No

If you answered Question No. 7 "yes", go directly to Question No. 12. If "no", please answer Question No. 8.

QUESTION NO. 8: Do you find that the Wilsons sustained damages as a proximate result of the conduct you have found in Question No. 5 above in any one or more of the following categories: lost time defending trusts claims, emotional distress, indemnity for trusts claims, or attorney's fees in defense of trusts claims?

Please answer "yes" or "no".

Answer: Yes

If you answered Question No. 8 "no", go directly to Question No. 12. If "yes", please answer Question No. 9.

QUESTION NO. 9: What damages do you find will compensate the Wilsons for the conduct you have found in Question No. 5 above? This amount should only include lost time and emotional distress, if any, sustained by the Wilsons. (The court will determine any award for indemnity and/or attorney's fees, depending upon your answers to these questions.)

Answer: $200,000

QUESTION NO. 10: Do you find the Wilsons are entitled to punitive damages for the conduct you found in Question No. 5 above?

Please answer "yes" or "no".

Answer: No

If you answered "no" to Question No. 10, please go directly to Question No. 17. If "yes", please answer Question No. 11.

QUESTION NO. 11: What amount do you award the Wilsons against Local 12 by way of punitive damages?

$_____

If you have awarded damages under Question No. 9, please go directly to Question No. 17.

QUESTION NO. 12: Do you find that Carroll Wilson was induced to sign the Owner-Operator Short Form Collective Bargaining Agreement by any *negligent* false representation (negligent fraud) made by Earvin Kinsey or by another person in his presence and adopted by Earvin Kinsey, which in the exercise of ordinary reasonable care he should have known was false, that Carroll Wilson could not remove dirt from the site unless he signed?

Please answer "yes" or "no".

Answer: _____

If you answered Question No. 12 "no", please go directly to Question No. 17. If "yes", please answer Question No. 13.

QUESTION NO. 13: Do you find that Carroll Wilson actually and justifiably relied on the negligent false representation (negligent fraud) you have found in Question No. 12 above?

Please answer "yes" or "no".

Answer: _____

If you answered Question No. 13 "no", please go directly to Question No. 17. If "yes", please answer Question No. 14.

QUESTION NO. 14: Do you find that the Wilsons sustained damages as a proximate result of the conduct you have found in Question No. 12 above in any one or more of the following categories: lost time defending trusts claims, emotional distress, indemnity for trusts claims, or attorney's fees in defense of trusts claims?

Please answer "yes" or "no".

Answer: _____

If you answered Question No. 14 "no", please go directly to Question No. 17. If "yes", please answer Question No. 15.

QUESTION NO. 15: Do you find that the Wilsons waived (gave up) their right to damages or indemnity for any negligent misrepresentation (negligent fraud) in the inducement, if any, by reason of any voluntary compliance by the Wilsons with the owner-operator agreement after they knew, or in the exercise of ordinary reasonable care should have known, of the alleged negligent fraud, barring and estopping them from obtaining damages or indemnity?

Please answer "yes" or "no".

Answer: ————————

If you answered "yes", to Question No. 15, please go directly to Question 17. If "no", please answer Question No. 16.

QUESTION NO. 16: What damages do you find will compensate the Wilsons for the conduct you have found in Question No. 12 above? This amount should only include lost time and emotional distress, if any, sustained by the Wilsons. (The court will determine any award for indemnity and/or attorney's fees, depending upon your answers to these questions.)

Answer: $————————

QUESTION NO. 17: Do you find that Carroll Wilson signed the Owner-Operator Short Form Collective Bargaining Agreement" as a proximate result of an intentional false representation (intentional fraud) made by Earvin Kinsey with regard to the effect of the agreement on his status?

Please answer "yes" or "no".

Answer: Yes

If you answered Question No. 17 "no", please answer no further questions, but date and sign this verdict form and return it to the court.

If you answered Question No. 17 "yes", please answer Question No. 18.

QUESTION NO. 18: Do you find that Carroll Wilson actually and justifiably relied on the intentional false representation you have found in Question No. 17 above?

Please answer "yes" or "no".

Answer: Yes

If you answered "no" to question No. 18, do not answer any further questions, but date and sign this verdict form and return it to the court.

If you answered "yes" to Question No. 18, please answer Question No. 19.

QUESTION NO. 19: Do you find that the Wilsons waived (gave up) their right to recover for any intentional misrepresentation with regard to the effect of the agreement on Carroll Wilson's status, if any, by reason of any voluntary compliance with the owner-operator agreement after they knew or should have known of the alleged intentional misrepresentation, barring and estopping them from any recovery for this conduct?

Please answer "yes" or "no".

Answer: No

DATED: 1/25/88

/s/ [Illegible]
Foreperson

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Case No. 84-2476-B(M)

OPERATING ENGINEERS PENSION TRUST, OPERATING ENGINEERS HEALTH AND WELFARE FUND, OPERATING ENGINEERS VACATION-HOLIDAY SAVINGS TRUST, and OPERATING ENGINEERS TRAINING TRUST,
Plaintiffs,

v.

CARROLL E. WILSON and PATRICIA J. WILSON, individually and doing business as WILSON EQUIPMENT, a partnership,
Defendants.

AND RELATED CROSS-CLAIM.

JUDGMENT

[Entered Aug. 15, 1988]

Based upon the special verdict of the jury, rendered January 25, 1988, and the findings and conclusions of the Court, the following judgment is awarded:

Judgment is hereby awarded in favor of defendants Wilson Equipment, Patricia Wilson, and Carroll E. Wilson and against plaintiffs Operating Engineers Pension Trust, Operating Engineers Health and Welfare Fund, Operating Engineers Vacation-Holiday Savings Trust, and Operating Engineers Training Trust (hereinafter referred to collectively as "plaintiffs") on plaintiffs' action against defendants; plaintiffs shall take nothing by way of said action.

Judgment is hereby awarded in favor of cross-complainants Wilson Equipment, Patricia Wilson, and Carroll E. Wilson and against cross-defendant International Union of Operating Engineers, Local 12 in the sum of TWO HUNDRED THOUSAND DOLLARS ($200,000.00). Interest on said award shall accrue at the rate specified under 28 U.S.C. § 1961, calculated from the date of entry of this judgment.

Judgment is hereby awarded in favor of defendants Carroll E. Wilson, Patricia J. Wilson, and Wilson Equipment against plaintiffs and cross-defendant, jointly and severally, in the sum of $137,600.00 for attorneys' fees and litigation expenses incurred by defendants in defending this action at the trial court level. This judgment against plaintiffs is awarded pursuant to 29 U.S.C. § 1132(g)(1), and against cross-defendant as consequential damages for fraud in the execution and fraud in the inducement.

With respect to the award against plaintiffs, the Court notes that following the jury trial of the actions herein, defendants filed their Application for Attorneys' Fees and Litigation Expenses pursuant to 29 U.S.C. § 1132(g)(1). The Court, having considered the evidence at trial, the application of defendants, the memoranda of points and authorities filed by plaintiffs and defendants, the declarations, and the argument of counsel, rules as follows:

1. Pursuant to 29 U.S.C. § 1132(g)(1) this Court has discretion to allow reasonable attorneys' fees and expenses and to award same to a prevailing defendant in an action brought by a fiduciary to collect allegedly unpaid benefit contributions.

2. An award of attorneys' fees and costs is appropriate in this case because the facts resemble the facts in *Operating Engineers Pension Trust v. Gilliam*, 737 F.2d 1501 (9th Cir. 1984). This Court is persuaded to exercise its discretion and award attorneys' fees and expenses

not only because of the factual similarity to *Gilliam*, but also by the fact that the plaintiffs in *Gilliam* are the plaintiffs in this action, and as in *Gilliam* are represented by the same counsel, Jett and Laquer (formerly Jett, Clifford & Laquer).

3. The Court in considering the award of attorneys' fees and expenses against plaintiffs is cognizant of the factors set forth in *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446 (9th Cir. 1980). The Court exercises its discretion to make this award because (1) the prosecution of this action in light of *Gilliam* was completely unjustified and shows an extreme lack of factual investigation and diligence on the part of plaintiffs, (2) the plaintiffs possess the ability to satisfy an award of attorneys' fees and expenses against them, (3) such an award will tend to deter others from acting under similar circumstances, and (4) the merits of defendants' position were such that plaintiffs should not have burdened defendants with the need to defend this action.

4. All parties to this action have stipulated that $137,600.00 represents a reasonable sum for the attorneys' fees and litigation expenses incurred by defendants in defending this action at the trial court level, and the Court has approved this stipulation. In approving this stipulation, the Court has considered the following factors and found the stipulated amount to be reasonable: (1) the novelty and complexity of the issues; (2) the time devoted to the case by counsel for defendants; (3) their ability and experience; (4) customary attorneys' fees charged in this district and in the Central District of California (where this action was originally brought); (5) the result obtained by counsel for defendants; and (6) awards in similar cases. *See, Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976).

It is so ORDERED, ADJUDGED, and DECREED this 9th day of August, 1988.

/s/ Rudi M. Brewster
HONORABLE RUDI M. BREWSTER
United States District Judge

APPROVED AS TO FORM:

REICH, ADELL & CROST

DATE: 7-11-88

By: /s/ Anthony R. Segall (disapproved)
ANTHONY R. SEGALL
Attorneys for Cross-Defendant,
INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 12

DISAPPROVED AS TO FORM AND CONTENT:

JETT & LAQUER

DATE: July 15, 1988

By: /s/ Michael A. Urban
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Attorneys for Plaintiffs,
OPERATING ENGINEERS PENSION
TRUST, *et al.*

APPROVED AS TO FORM:

SHEPPARD, MULLIN, RICHTER & HAMPTON

DATE: June 29, 1988

By: /s/ Richard M. Freeman
RICHARD M. FREEMAN
Attorneys for Defendants and
Cross-Complainants,
CARROLL E. WILSON, PATRICIA
J. WILSON, AND WILSON EQUIPMENT

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Case No. 84-2476-B(M)

OPERATING ENGINEERS PENSION TRUST, OPERATING ENGINEERS HEALTH AND WELFARE FUND, OPERATING ENGINEERS VACATION-HOLIDAY SAVINGS TRUST, and OPERATING ENGINEERS TRAINING TRUST,
Plaintiffs,

v.

CARROLL E. WILSON and PATRICIA J. WILSON, individually and doing business as WILSON EQUIPMENT, a partnership,
Defendants.

AND RELATED CROSS-CLAIM.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Filed Aug. 12, 1988]

This case was tried by a jury and verdict was duly rendered on January 25, 1988. Pursuant to pre-trial discussion and agreement between the parties, the issue of whether defendants and cross-complainants Carroll E. Wilson, Patricia J. Wilson, and Wilson Equipment (collectively, "defendants" or the "Wilsons") were entitled to receive attorneys' fees and litigation expenses incurred in defending the action brought by plaintiffs as consequential damages for fraud committed by cross-defendant International Union of Operating Engineers, Local 12 ("Local 12"), was reserved for the Court. Based upon the evidence presented at trial, the defendants' Applica-

tion for Award of Attorneys' Fees and Litigation Expenses submitted post-trial, cross-defendant's opposition to same, the declarations, and the argument of counsel, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Promptly and reasonably upon defendants ascertaining that fraud had been committed in the representations made to Carroll E. Wilson by Local 12's agent Hoss Kinsey on May 14, 1982, defendants' counsel sent identical letters to both Local 12 and the plaintiffs repudiating and/or rescinding the agreement and claiming that it was void *ab initio* because of fraud.

2. The plaintiff Trust Funds responded to this claim of fraud by informing the defendants that they were turning the matter over to their attorneys.

3. Local 12 never responded to this claim of fraud.

4. Because of the fraud committed by Local 12, defendants were forced to incur attorneys' fees and related expenses in defending the suit brought by the plaintiff Trust Funds.

5. All parties hereto have stipulated that the sum of $137,600.00 represents the reasonable amount of attorneys' fees and litigation expenses incurred by defendants in defending the action brought by plaintiff Trust Funds at the trial court level.

6. The Wilsons filed their claim against Local 12 in December, 1984.

CONCLUSIONS OF LAW

1. Because the jury has found that defendant Carroll E. Wilson justifiably relied on intentional misrepresentations of Hoss Kinsey, acting as the agent of Local 12, Local 12 is required to indemnify the defendants for the

full amount of their damages arising from such fraud. This sum includes the legal fees incurred by defendants in defending the case brought by the plaintiff Trust Funds. *Rozay's Transfer v. Local Freight Drivers, Local 208, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America*, Case No. 84-8313 (C.D. Cal., June 23, 1986), and cases cited therein.

2. The jury found, and the Court also finds that the defendants did not unreasonably delay in seeking to rescind the Master Labor Agreement signed by Carroll E. Wilson, and that the defendants did not waive their right to seek rescission.

3. The Wilsons' actions for rescission and for damages for fraud in the execution under Section 301 of the Labor-Management Relations Act are not barred by the six month statute of limitations proscribed by *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S. Ct. 2281 (1983), because this case is not a hybrid breach of contract/breach of fair representation case. Under Section 301 the appropriate statute of limitations is borrowed from analogous state law. Since the Wilsons' actions were clearly filed within the two appropriate available state statutes of limitation, either the four year statute of limitations under California Code of Civil Procedure Section 337 governing actions for rescission, or the three year statute of limitations under California Code of Civil Procedure Section 338 governing actions for fraud, the Court need not address the issue of exactly which statute applies.

4. The stipulated sum of $137,600.00 represents the reasonable attorneys' fees and litigation expenses incurred by defendants at the trial court level in defending the action brought by plaintiff Trust Funds.

5. All parties to this action have stipulated that $137,600.00 represents a reasonable sum for the attorneys' fees and litigation expenses incurred by defend-

ants in defending this action at the trial court level, and the Court has approved this stipulation. In approving this stipulation, the Court has considered the following factors and found the stipulated amount to be reasonable: (1) the novelty and complexity of the issues; (2) the time devoted to the case by counsel for defendants; (3) their ability and experience; (4) customary attorneys' fees charged in this district and in the Central District of California (where this action was originally brought); (5) the result obtained by counsel for defendants; (6) awards in similar cases. *See, Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976).

DATED: Aug 09 1988.

/s/ Rudi M. Brewster
HONORABLE RUDI M. BREWSTER
United States District Judge

APPROVED AS TO FORM:

REICH, ADELL & CROST

DATE: 7-11-88

By: /s/ Anthony R. Segall (disapproved)
ANTHONY R. SEGALL
Attorneys for Cross-Defendant,
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OPERATING ENGINEERS, LOCAL 12

DISAPPROVED AS TO FORM AND CONTENT:

JETT & LAQUER

DATE: July 15, 1988

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RICHARD M. FREEMAN
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Cross-Complainants,
CARROLL E. WILSON, PATRICIA
J. WILSON, AND WILSON EQUIPMENT

SUPREME COURT OF THE UNITED STATES

No. A-843

INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL NO. 12, AFL-CIO,
Petitioner

v.

CARROLL WILSON, *et al.*

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including June 27, 1991.

/s/ Sandra D. O'Connor
Associate Justice of the
Supreme Court of the
United States

Dated this 9th day of May, 1991.

Supreme Court, U.S.
FILED
JUL 30 1991
OFFICE OF THE CLERK

(2)

No. 91-4

In The

Supreme Court of the United States

October Term, 1991

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL NO. 12, AFL-CIO,

Petitioner,

v.

CARROLL WILSON, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state law claim for fraud is preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, merely because the tortfeasor is employed by a labor union, where the labor union does not represent the employer victim's employees, and where the fraud in question takes place completely outside the context of collective bargaining and has nothing to do with the ordering or development of labor relations or working conditions?

LIST OF PARTIES TO THE PROCEEDING

The following list comprises all parties to the underlying District Court action, and all related corporate entities pursuant to Rule 29.1.

Operating Engineers Pension Trust

Operating Engineers Health and Welfare Fund

Operating Engineers Vacation-Holiday Savings Trust

Operating Engineers Training Trust

Carroll E. Wilson

Patricia J. Wilson

Wilson Equipment, a Partnership

C. E. Wilson Corporation

International Union of Operating Engineers, Local No. 12

Eugene Kinsey

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No. 91-4

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Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 915 F.2d 535 and is reprinted in the separately bound Petitioner's Appendix (hereafter PA) at pp. 1a-16a. The District Court entered findings of fact and conclusions of law, which are reproduced in Petitioner's Appendix.

JURISDICTION

Respondents agree with Petitioner's statement of the jurisdictional provisions. Respondents disagree that this

Court should exercise its discretion to grant certiorari in this unique, fact-specific case.

STATUTORY PROVISIONS INVOLVED

Respondents agree that the statutes cited by Petitioner are raised in its Petition.

STATEMENT OF THE CASE

The respondents are Carroll Wilson and his wife Patricia Wilson, who at the time of the events in question were the sole partners in a small grading business, Wilson Equipment (later incorporated as C. E. Wilson Corp.). ("Wilsons" shall refer to both Mr. and Mrs. Wilson as well as their partnership).

After a career in the Navy, Mr. Wilson retired and went into the grading business. The Wilsons slowly built up a small business, with Mr. Wilson running equipment and supervising the jobsite work and Mrs. Wilson handling the office and paperwork. In 1982 they employed two or three operators, none of whom were Union members. They had no agreement with any union.

This case arose on May 14, 1982 when the Petitioner's (the "Union" shall refer to Petitioner Local 12) Business Agent lied to Wilson in order to induce him to sign a piece of paper called an "Owner-Operator Agreement." The Wilsons were grading the site for a gymnasium, and they needed extra dirt. Mr. Wilson found excess dirt at a nearby job site being run by a general contractor called

Lyle Parks (the "General"). He cut a deal with the job superintendent for the General to haul away the dirt for free. This arrangement benefitted them both.

The General was not a signatory to any agreement with the Union, and did not require its subcontractors to operate under any union agreement. The Union's Business Agent knew this.

Nonetheless, the Business Agent approached Wilson and told Wilson that he could not work on the site. Wilson explained that he had the General's permission to remove the dirt. The Business Agent told Wilson that the General had said that Wilson must be "union" to work on the job, and that Wilson must sign an "Owner-Operator" form to run his own equipment on the job. There was no discussion about other jobs; there was no discussion about employees or terms and conditions of work. At this point, the Business Agent's first lie, the one at issue, was complete. He had lied to Wilson about the General's alleged statement that Wilson had to sign the Owner-Operator form.[1] The Business Agent admitted on cross-examination that he knew the General was *not* a union signatory, and did *not* require its subcontractors to be union.

Several expensive rented dump trucks were waiting to be loaded. Wilson was in a hurry. Wilson signed the Owner-Operator form on the hood of the automobile

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[1] The Business Agent then lied to Wilson about the effect of signing the form. This is the lie about whether the form would affect Wilson's status, the lie which the District Court concluded required interpretation of the form and therefore was governed by § 301. The second lie is not at issue.

beside them, relying on the Business Agent's representation that it was required. The entire dialogue took only a few minutes. Unbeknownst to the Wilsons, the Owner-Operator form purported to bind them to a Master Labor Agreement requiring payments to various Union trust funds.

In 1984, the trust funds filed suit against the Wilsons under § 301 for "breach" of the Owner-Operator form for failure to make contribution payments. The Wilsons cross-complained against the Union, alleging fraud.

The jury returned a verdict for the Wilsons against both the trust funds and against the Union. The jury found that there was no contract. The jury found that the Business Agent defrauded Wilson by lying about the need to sign the form to work on that job, and awarded the Wilsons $200,000.00 in damages for lost time and emotional distress. The jury also found that the Business Agent defrauded Wilson by lying about whether the agreement would change his status.

The Union appealed, claiming that the state law claim based on the lie about the Owner-Operator form being required for that job was preempted by § 301. The Ninth Circuit ruled, in a straightforward application of this Court's precedent, that the state law claim was not preempted because it did not require interpretation of the owner-operator form. (PA 9a-10a, quoting *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988).)

ARGUMENT: THERE IS NO REASON TO GRANT CERTIORARI

The Union urges certiorari based upon a supposed split in the circuits, *Garmon* preemption, and the argument that the Circuit Court was wrong. None of these rationales is convincing.

The supposed "split" is not only mythic, it has nothing to do with *this* case, and has never been briefed or addressed by the parties or the courts below.

Preemption by the National Labor Relations Act under *San Diego Building and Trades Council v. Garmon*, 359 U.S. 236 (1959), is not a possibility in this case because the Union was not the certified collective bargaining representative of the two or three operators the Wilsons employed.

The Ninth Circuit's decision on § 301 is in full accord with this Court's development of the law. Regardless, the outcome of the case would be the same because the Wilsons prevailed on their § 301 fraud claim as well as their state law claim, and any realistic view of § 301 would include damages for lost time and emotional distress.[2]

Finally, this is not a case of national importance or widespread application. It turns on its unique facts: an out-and-out lie perpetrated by one stranger on another,

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[2] *See, Richardson v. Communications Workers of America*, 443 F.2d 974 (8th Cir. 1971); *De Arroyo v. Sindicato de Trabajadores Packing*, 425 F.2d 281 (1st Cir. 1970); *UAW v. Federal Forge, Inc.*, 583 F. Supp. 1350 (W.D. Mich. 1984).

completely outside the context of any collective bargaining relationship. Unlike the cases relied upon by the Union, this is a situation where one party had not a clue that any kind of agreement purporting to regulate working conditions of employees was being proposed.

1. THE SUPPOSED "SPLIT" IN THE CIRCUITS HAS NOTHING TO DO WITH THE RELEVANT ISSUE IN THIS CASE.

The "split" in the circuits which the Union identifies does not deal with the relevant issue in this case – whether § 301 preempts a pendent state law claim for garden variety fraud merely because the liar happens to be a union business agent.

Not a single one of the cases cited by the Union in support of the "split" deals at all with § 301 preemption of state law claims. Rather, the cases discuss whether § 301 confers subject matter jurisdiction to examine the validity or existence of a collective bargaining agreement. No party contested that issue in our case. All parties, the Wilsons, the Union, and the trust funds, assumed that § 301 provides subject matter jurisdiction to decide the validity or existence of a collective bargaining agreement.[3] The issue was never briefed at the District or Circuit Court level.

Thus, since all parties are in agreement on the issue on which the Circuits are supposedly "split," this case is

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[3] The Wilsons had a § 301 fraud claim based on the Business Agent's second lie, as well as the pendent state law fraud claim under discussion.

not an appropriate vehicle for review of that issue. The "split" of which the Union complains, if it really exists, should be resolved in a case where the lower courts squarely faced the issue with the benefit of briefing and argument by the parties.

There is even a question as to whether the "split" really exists, for the reason explained by the Solicitor General in his *amicus* brief opposing *certiorari* in *Rozay's Transfer v. Local Freight Drivers*, 850 F.2d 1321 (9th Cir. 1988), *cert. denied*, 409 U.S. 1030 (1989) (*Rozay's II*), that the courts of appeals are moving toward a consensus that § 301 confers jurisdiction to adjudicate claims that collective bargaining agreements are invalid.[4]

There is no split in the circuits on the *relevant* issue: whether § 301 preempts a pendent state law claim for fraud arising completely outside the context of collective bargaining.

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[4] The Union's suggestion that the Solicitor General would plead for the application of § 301 to this case is unjustified. There are significant and decisive factual differences between our case and *Rozay's II*, the most important of which is that *Rozay's II* arose in the context of an established collective bargaining agreement and relationship. The Solicitor General did not have the facts of *this* case before him. The relevant point is that the Solicitor General correctly viewed the Circuit Courts as moving toward an accord on the issue of subject matter jurisdiction, which is *not* an issue raised by the instant case.

2. GARMON PREEMPTION: THE RELATIONSHIP BETWEEN BAD FAITH BARGAINING UNDER THE NATIONAL LABOR RELATIONS ACT AND SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT IS NOT PROPERLY A SUBJECT OF THIS CASE.

Section 8 of the National Labor Relations Act is typically the exclusive remedy for bad faith bargaining. The predicate to the application of Section 8 is the existence of a legally-required duty to bargain in good faith. 29 U.S.C. § 158. As the Ninth Circuit noted below, that issue does not arise here because there was no legal obligation to bargain (PA 10a-12a). A union cannot compel an employer to bargain with respect to employees the union does not represent. Here, the Union did not represent the Wilsons' employees.

Further, even if the Owner-Operator form is characterized as a pre-hire contract,[5] a creature unique to the construction industry, the NLRB and courts are clear that there is no duty to bargain over pre-hire contracts. In other words, federal law has no interest in compelling bargaining for such a contract, nor in regulating the terms of such bargaining. The only obligation relating to a pre-hire contract is to follow its terms for its duration. There is not even an obligation to negotiate for a successor agreement. *John Deklewa & Sons*, 282 NLRB 184 (1987), *enforced*, 843 F.2d 770 (3d Cir.), *cert. denied*, 488 U.S. 889

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[5] Even that characterization would be a shock to Wilson – all he knew was what the Business Agent told him – that the General required him to sign a form in order to run his machine on that job.

(1988). Where is the basis for preemption if the parties do not even have to talk about such a contract?

Most importantly, perhaps, the Union's high-flown characterizations of the Owner-Operator form as a "pre-hire contract" and the brief conversation between Wilson and the Union Business Agent as "bargaining" are both incorrect on the specific *facts* of this case. (*See* Ninth Circuit opinion, PA 11a-12a.)

The cases cited by the Union, *Parker*, *Serrano*, and *Kolentus*, have no application to our situation. All concern established, long-standing collective bargaining relationships between a union and employer. The obligation to bargain in good faith under Section 8(a) of the NLRA was clear. Each of those cases dealt with state law fraud claims claiming, essentially, that an employer had committed fraud in obtaining concessions in a collective bargaining agreement by representing that it would keep a plant open. None of those cases deal with the construction industry or pre-hire contracts. All deal with the obligation to bargain in good faith that exists between an employer and a union as the duly certified collective representative of a group of employees who have voted for such representation.[6]

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[6] *Machinists v. Wisconsin Emp. Rel. Comm'n.*, 427 U.S. 132 (1976), a *Garmon* preemption case cited by the Union in a footnote, is even farther removed from the facts of this case. There, the State of Wisconsin ordered a union to cease and desist from a partial strike. *Machinists* merely recognizes that a union has a right to strike for better wages and working conditions, as part of its right to use "economic weapons" when bargaining on behalf of its members for a successor collective bargaining agreement.

The Union's unsupported claim that the large number of multi-state agreements requires some vague decisional uniformity is disproved by none other than Robert Georgine, President of the AFL-CIO Building and Construction Trades Department, in his testimony to Congress regarding a recent unsuccessful effort to amend the LMRA to prohibit double-breasting (simultaneous ownership and operation of union and non-union construction companies). Georgine testified that in the construction industry:

> *[N]ational agreements represented only a minuscule percentage of collective bargaining agreements* . . . a total of approximately 9,500 local agreements and only 185 national or multistate agreements, the latter representing *under two percent* of the total number of agreements. And even that percentage is artificially inflated, as dozens (or even hundreds) of individual employers may sign or assent to a single collective bargaining agreement between a local union and a multi-employer association.

BNA Daily Labor Report (March 5, 1987). Thus, even accepting the questionable thesis that application of a universally-accepted doctrine such as fraud creates a possibility of varying standards from state to state, the problem is not of national importance.[7]

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[7] The Union also suggests that the identical conduct was subjected to varying standards under federal versus state law in this case. Not true. The Business Agent told two *different* lies. The District Court applied *its understanding* of federal law to one, state law to the other. Since there are no specific statutory guidelines defining fraud in the LMRA, a court *must*

(Continued on following page)

3. THE DECISION BELOW IS CORRECT: UNDER THIS COURT'S DEVELOPMENT OF SECTION 301, A STATE LAW FRAUD CLAIM ARISING COMPLETELY OUTSIDE ANY COLLECTIVE BARGAINING RELATIONSHIP AND NOT BASED IN ANY WAY ON THE CONTENT OF THE ALLEGED COLLECTIVE AGREEMENT IS NOT PREEMPTED MERELY BECAUSE THE TORTFEASOR IS EMPLOYED BY A LABOR UNION.

The decision below is nothing more than a straightforward application of the test for § 301 preemption repeatedly endorsed by this Court: when "the state law claim can be resolved without interpreting the agreement itself," there is no preemption. *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 421 (1988) ("*Lingle*").

In *Lingle*, the Court reversed the Seventh Circuit's conclusion that a state law claim alleging retaliatory discharge for filing a worker's compensation claim was preempted because it was "inextricably intertwined" with a collective bargaining provision prohibiting discharge without just cause. The Supreme Court specifically *rejected* the Seventh Circuit's analysis that the state law claim was pre-empted because it "implicates the same analysis of facts as would an inquiry under the just cause provisions." The Court ruled:

(Continued from previous page)

look to relevant state law. *See, DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). California law permits recovery for negligent misrepresentation and therefore that theory should have applied to the § 301 claim as well as the state law claim – a point which Respondents argued below but obviously had no reason to appeal.

> [E]ven if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, *as long as the state law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for § 301 pre-emption purposes.* [Emphasis added.] Id.

This conclusion is nothing new, as the Court's citation of *Caterpiller, Inc. v. Williams*, 482 U.S. 386, 107 S.Ct. 2425 (1987); *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985); and *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962) shows.

The Union's sweeping assertion that matters relating to "contract formation" are within the ambit of § 301 and therefore automatically pre-empted is no different than the Seventh Circuit's mistaken conclusion that § 301 pre-empts merely because the same general set of facts is implicated by a state law claim as would be implicated by a § 301 claim. The Union argues that simply because the Business Agent is employed by a union and his lies occurred within a few minutes of each other, § 301 must control. *Lingle* holds that such an analysis begs the question. The inquiry is whether the claim requires interpretation of a collective bargaining agreement. The conclusion that the Business Agent lied when he told Wilson the General required him to sign an Owner-Operator form requires no such analysis.

The Union's characterization of the issue as one of "contract formation" is not only irrelevant, it is mistaken. The Union ignores the central conclusion in this case, reached by the jury upon three weeks of evidence: *Wilson had no idea* that the document the Business Agent tricked

him into signing had anything to do with collective bargaining. There was no haggling over terms, no give and take. There was a brief exchange premised upon what the jury found to be an outright lie: the false statement that the General required Wilson to sign an Owner-Operator form in order to take the dirt on that job.

Application of § 301 to such facts would miss the point of preemption. The salient passage from *Lucas Flour* is the one that explains the reason for preemption: the need for "individual contract terms" to have a uniform meaning so that parties who are *negotiating* and *administering* collective agreements have a clear and consistent understanding of the private labor law they are creating.

> The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal system to promote industrial peace. State law which frustrates the efforts of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy.

Teamsters v. Lucas Flour Co., 369 U.S. 95, at 103-104.

It is evident from the Court's consistent use of words such as "free," "voluntary," and "consensual," that the Court is speaking to situations where two parties knowingly sit down at the bargaining table. The intercourse between Wilson and the Business Agent was not the mutual, knowing negotiation of a collective agreement envisioned by Congress and discussed in *Lucas Flour*.

United Steelworkers of America v. Rawson, ___ U.S. ___, 58 L.W. 4556 (1990) is not to the contrary. Like *all* of the

cases the Union cites, it arose squarely in the context of an established collective bargaining relationship. The Court's statement of the issue at stake is instructive:

> We granted certiorari in this case because [it] . . . raised important questions about the operation of federal and state law in *defining the duties of a labor union acting as a collective bargaining agent*. (Emphasis added.)

58 L.W. at 4557. The lawsuit, filed by the estates of several employees killed in a mine explosion, was based on the claim that the union had, through a collective bargaining agreement with the employer, established a joint management labor safety committee, and that the union, through its representatives on the committee, had negligently inspected the mine.[8]

The *Rawson* result rests upon the fact that a union performing its obligations to the employees it represented under the terms of a collective bargaining agreement it negotiated undertook to inspect a mine and then did a poor job of it. The Court took pains to note that "[t]his is not a situation where the Union's delegates are

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[8] The result in *Rawson* is merely a straightforward application of *Electrical Workers v. Hechler*, 481 U.S. 851 (1987), which holds that an employee's state law tort suit against her union for breach of the union's duty of care was governed by federal law where the duty allegedly arose from the collective bargaining agreement between union and employer. The *Rawson* decision is premised on the conclusion that the plaintiffs were asserting exactly the same type of claim as in *Hechler*: "The only possible interpretation of these pleadings, we believe, is that the duty on which respondents relied as the basis of their tort suit was one allegedly assumed by the Union in the collective bargaining agreement." *Rawson*, 58 U.S.L.W. at 4558.

accused of acting in a way that might violate the duty of reasonable care owed to every person in society." 58 U.S.L.W. at 4558.

Compare that to our case. Our case is premised on exactly the kind of general duty, owed by all persons to other persons, that *Rawson* was not. As an example, if the superintendent of the General had falsely told Wilson that he was required to sign an Owner-Operator form to work on the site, the Wilsons would have sued him under exactly the same theory. The Wilsons' suit for fraud in the inducement does not draw its shape from the fact that a union business agent lied about the necessity for what the Union characterizes as a pre-hire contract. The suit draws its essence from the fact that a person (not necessarily a union agent) lied to Wilson about the need to sign a piece of paper (it could have been any piece of paper – a waiver, a permit, and so on, the list is endless.)[9]

The Ninth Circuit correctly applied § 301 law to this case. Recognizing that "there is nothing novel about recognizing that substantive rights in the labor relations context can exist without interpreting collective bargaining agreements" (*Lingle*, 486 U.S. at 411), the Court found that interpretation of the alleged agreement was

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[9] The Union also cites *Dowd Box v. Courtney*, 368 U.S. 502 (1962), but it does not speak to our situation either: "The sole question presented by this case is whether [§ 301] operates to divest a state court of jurisdiction over a suit for violation of a contract between an employer and a labor organization." 368 U.S. at 503. (The answer, by the way, is no.) There was no state law claim in the case; it did not present the Court an opportunity to rule on the test for § 301 preemption of state law rules.

not required to resolve the Wilsons' fraud claim. That finding is completely consistent with this Court's decisions, and the unique facts of this case.

CONCLUSION

As explained, there is no reason to grant certiorari in this case. The petition for a writ of certiorari should be denied.

Dated: July 30, 1991

Respectfully submitted,

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Supreme Court, U.S.
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No. 91-4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL NO. 12, AFL-CIO,
Petitioner,

v.

CARROLL WILSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY BRIEF

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IN THE

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LOCAL NO. 12, AFL-CIO,
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY BRIEF

ARGUMENT

1. Beginning with their counterstatement of the question presented, respondents' strategy is to remake this case into one of little importance in labor relations without the least regard for the facts or the decisions below.

(a) The brief in opposition thus characterizes the decision below as limited to situations in which "the fraud in question takes place completely outside the context of collective bargaining and has nothing to do with the ordering or development of labor relations or working conditions". Opposition to Petition for a Writ of Certiorari (Opp. Br.) at i. That is a blatant mischaracterization.

This case began as an action by joint labor-management trust funds to enforce the terms of an agreement signed by Mr. Wilson entitled, in large capital

letters, "OWNER-OPERATOR SHORT FORM *COLLECTIVE BARGAINING AGREEMENT* WITH THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL UNION NO. 12." (We attach the Agreement as an appendix hereto (emphasis supplied).) The first Article of the Agreement states, moreover, that "The Owner-Operator hereby recognizes the Union as the sole and exclusive bargaining representatives of all persons *employed* by the Owner-Operator who perform any work of the nature included in the craft jurisdiction of the Union." App. 1a (emphasis added).[1]

Given the document's title and first article, it is simply not true, as the Wilsons now represent, that "Wilson had not a clue that any kind of agreement purporting to regulate working conditions of employees was being proposed." Opp. Br. at 6. Certainly there is nothing in the jury verdict to suggest that the jury so concluded.[2]

Thus, the essence of the matter is that the *dispute* between the trust funds and the Wilsons involved the Wilsons' failure to pay contributions toward *fringe benefits for their employees* as promised pursuant to a document entitled a "Collective Bargaining Agreement."[3] Under

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[1] Article I goes on: "This Agreement covers only such of the Owner-Operator's activities in which he/she is functioning as an Employer, or is having persons or entities perform services for him/her." App. 1a.

[2] The jury found only that (1) Mr. Wilson did not know the *essential terms* of the Agreement before signing (not that he did not know that he was signing a collective bargaining agreement) (Pet. App. 19a); and (2) there was a false representation as to "the effect of the agreement on his status," (Pet. App. 24a). As to the latter, the Union, on appeal to the Ninth Circuit, argued that there could be no finding of fraud, because Mr. Wilson had simply to read the Agreement to discover its effect on his status. The Ninth Circuit did not address this defense, however, choosing to affirm the money judgments against the Unions on the basis of the "fraud in the inducement" claims here at issue. Pet. App. 6a.

[3] Certainly the fact that the negotiations were brief (Opp. Br. at 13) does not have any relevance to the applicability of § 301. Obviously, employers and unions are as bound by collective bargain-

these circumstances, the dispute is precisely whether the collective bargaining agreement's terms "ordering . . . labor relations [and] working conditions" (Opp. Br. at i) are enforceable.

(b) Not surprisingly, nothing in the Ninth Circuit opinion accepts the truncated view of this case put forward by the respondents in their opposition brief. To the contrary, the court of appeals explicitly decided the broad labor law issue raised in our *certiorari* petition.

The Ninth Circuit began from the premise that a § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, cause of action lay for fraud in inducing Mr. Wilson to sign the Agreement: That court repeatedly referred to the agreement in question as a "collective bargaining agreement" (Pet. App. 2a (twice), 3a, 7a, 10a), and recognized, as applicable to this case, the rule that "an action for fraud in the inducement is cognizable under section 301, to contest the formation of an agreement," (Pet. App. 9a).

Indeed, the court of appeals framed the § 301 issue before it as whether "section 301 preempts state law in all matters that pertain to the formation of collective bargaining agreements", (Pet. App. 8a), and relied exclusively upon cases arising in the context of collective bargaining agreeemnts, (Pet. App. 6a-10a citing *Allis Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988);

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ing agreements when they are able to reach agreement quickly as when they haggle over many bargaining sessions.

Nor can this case be placed outside § 301's ambit because the collective bargaining agreement in question was the first between the employer and the union, or because the agreement was one sanctioned by § 8(f) of the National Labor Relations Act, as amended, 28 U.S.C. § 158(f), and therefore entered into without any prior indication by the employers' employees that they had chosen the Union to represent them. *See Jim McNeff v. Todd*, 461 U.S. 266 (1983); *Woelke & Romero Framing Co. v. NLRB*, 456 U.S. 645 (1982). Nothing in § 301, or in any case law interpreting that section, draws any such distinctions.

Local 174 Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962); *Rozay's Transfer v. Local Freight Drivers*, 850 F.2d 1321 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1768 (1989) (*"Rozay's II"*)).

Equally to the point, the Ninth Circuit's holding was that a "state tort claim[] for fraud in the inducement is not preempted by section 301 *because it does not require reference to the collective bargaining agreement.*" Pet. App. 10a (emphasis added). This broad holding does *not* rest in any way on "unique facts" as to occurrences "completely outside the context of any collective bargaining agreement." Opp. Br. at 5-6.

2. The Wilsons maintain also that *certiorari* should be denied because issues concerning the validity of collective bargaining agreements are of no moment under national labor policy. In large part, their argument rests on the notion that because even if § 301 applies, fraud law principles derived from the law of the state in which the case arose would govern. Opp. Br. at 10-11. That understanding of § 301 and its office could not be more wrong.

The premise of this Court's § 301 opinions from *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), forward has been that the uniform enforcement of collective bargaining agreements is essential to a proper effectuation of national labor policy.

Not only do multistate agreements normally cover thousands of employees in numerous jurisdictions, but even local agreements are negotiated by national employers and labor organizations, and affect commerce nationally. Under the court of appeals' holding, moreover, a *single*, local collective bargaining agreement could give rise to damages under state law, because entered into as a result of fraud as defined by the state, while the agreement is at the same time enforceable under federal law as valid, because the negotiations do not violate federal fraud standards.

It is precisely because of these potential conflicts that "the subject matter of § 301(a) is 'peculiarly one that calls for uniform law.'" *Local 174 Teamsters v. Lucas Flour Co., supra*, 369 U.S. at 103 quoting *Pennsylvania R. Co. v. Public Service Comm.*, 250 U.S. 566, 569 (1919).

Lincoln Mills and its progeny make it clear, too, that state law should be adopted in § 301 cases *only* when there is no contrary uniform policy to be derived from the federal labor statutes and policies:

> [T]he substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. . . . The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation in fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. . . Federal interpretation of the federal law will govern, not state law. But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate federal policy. [*Lincoln Mills*, 353 U.S. at 456-567.] [4]

Here, there are federal statutory provisions—NLRA §§ 8(a)(5), 8(b)(3) and 8(d), 29 U.S.C. § 158(a)(5), (b)(3) & (d)—which govern the process of bargaining for collective agreements, and from which principles governing § 301 damage actions for improper bargaining could and should be derived. *See* Petition for Writ of Certiorari ("Petition") at 18 n.10. These provisions, which encourage free collective bargaining subject to lim-

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[4] It was on that basis, of course, that this Court held that state law contract rules against enforcing agreements to arbitrate must give way to the national labor policy favoring the negotiation and enforcement of such provisions. *Lincoln Mills*, 353 U.S. at 456.

ited administrative and judicial supervision, preclude, for example, recognition of a cause of action under § 301 for *negligent* misrepresentations in the bargaining process. *See* Pet. 17-18. In contrast, if the states provide a fraud cause of action to govern the negotiation of collective bargaining agreements, a state could turn to ordinary tort principles, without regard to considerations flowing from federal labor policy, and make such negligence actionable.

The disuniformity between state and federal law governing fraud claims is not just a theoretical possibility; it is manifest in the history of this case. The district court instructed the jury that the Wilsons' state and federal fraud claims differed both as to the substantive offense (intentional versus negligent misrepresentation) and the recoverable damages.[5] The union business agent

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[5] The trial court ruled that emotional distress damages and punitive damages were available under the state law fraud claim but not under the § 301 claim regarding Wilson's status. In their opposition brief, respondents attempt to minimize the significance of the choice of law issue, arguing that "any realistic view of § 301 would include damages for lost time and emotional distress." Opp. Br. at 5. Neither the trial court's rulings nor any case authorities support this view.

Respondents cite two duty of fair representation cases in which the courts of appeals recognized the theoretical propriety of awarding emotional distress damages in a § 301 action. *Richardson v. Communications Workers*, 443 F.2d 974, 985 (8th Cir. 1971); *De Arroyo v. Sindicato de Trabajadores Packing*, 425 F.2d 281, 293 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970). In neither case were such damages actually awarded. The *De Arroyo* court noted that it could conceive of awarding emotional distress damages only in an "exceptional case" involving "extreme conduct." In excising emotional distress damages from the Wilsons' § 301 claim, the trial court followed *Bloom v. Int'l Brotherhood of Teamsters*, 752 F.2d 1312, 1315 (9th Cir. 1984), another duty of fair representation case, where the court again left open the possibility of awarding emotional distress damages in a § 301 action, but limited their availability to cases involving "outrageous" conduct sufficient to support a non-preempted state tort claim for infliction of emotional distress. There is *no* authority for the proposition that emotional distress damages are available based on conduct surrounding the

was thus subject to two distinct standards of care in the course of a single conversation.

3. Respondents' attempt to wish away the circuit conflict outlined at pages 8-11 of the certiorari petition fares no better.

It is clear from their opposition brief itself that the Wilsons have been and still are contending that there is *no* § 301 jurisdiction over a fraud claim of the kind alleged here. Specifically, the Wilsons contend that where the plaintiff alleges that there was "not the mutual, knowing negotiation of a collective agreement envisioned by Congress and discussed in *Lucas Flour*", "[a]pplication of § 301 to such facts would miss the point of preemption." Opp. Br. at 13.[6] Thus, respondents' argument is not that there are concurrent federal and state interests in the subject matter of this law suit, but that there is no federal interest at all. As such, this contention—which has been in this lawsuit from the outset—necessarily raises the very question concerning the application of § 301 to collective bargaining agreement for-

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formation of a collective bargaining agreement, nor has this Court ever addressed their availability in any § 301 context.

The trial court also ruled that state and federal law differed with respect to punitive damages. Their unavailability under § 301 derives from policy concerns unique to federal labor law. *See Int'l Brotherhood of Electrical Workers v. Foust*, 422 U.S. 42, 50-51 (1979) (awarding punitive damages in duty of fair representation action would "impair the effectiveness of unions as collective-bargaining agents"); *Local 127, United Shoe Workers v. Brooks Shoe Mfg.*, 298 F.2d 277, 284 (3d Cir. 1962) (*en banc*) ("remedial" intent of § 301 precludes availability of punitive damages). While the jury declined to award punitive damages here, the cleavage between state and federal law regarding their availability further emphasizes the importance of the preemption issue and the broad range of questions that the Court may address by granting review of this case.

[6] While it is true that the Wilsons proceeded to trial on a § 301 fraud theory on the status statement (Opp. Br. at 6), they did so only because the trial judge ruled that § 301 governed. Throughout the pre-trial proceeding, the Wilsons argued that both of the "frauds" alleged were cognizable as state claims.

mation questions that respondents claim is not involved in this case.

As respondents' merger of the jurisdiction and preemption issues in their opposition brief demonstrates, the *ultimate* question involved in a matter such as this one is whether cases involving the validity of a collective bargaining agreement as a whole, as opposed to the application of discrete portions of the agreement, are to be tried under the laws of the various states, or under uniform federal law. That question, as we have noted, has been given *four* different answers by the various circuits:

(a) The Ninth Circuit holds that *either* state or federal law can apply.

(b) As the Solicitor General noted in his Brief for the United States as Amicus Curiae in *Local Freight Drivers, Local 208 v. Rozay's Transfer, Inc.*, Supreme Court No. 88-535 (*Rozay's II*), the Seventh, Third, Tenth, and Eleventh Circuit have treated the jurisdictional and preemption issues as one, holding that federal law applies.[7]

(c) Two circuits, the Fourth and the First, indicate that state law applies when the plaintiff is seeking only

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[7] These circuits, it is true, have not explicitly treated as a separate issue the question whether there is also jurisdiction under state law over identical questions concerning the formation of collective bargaining agreements. But the Tenth Circuit expressly relied upon the need to "develop uniform law" as one reason for finding § 301 jurisdiction over issues of contract validity, indicating that that court saw the questions whether there is jurisdiction under federal law over collective bargaining validity issues and whether there is *only* such jurisdiction, and none under state law, as one. *McNally Pittsburgh, Inc. v. International Association of Iron Workers*, 812 F.2d 615, 619 (10th Cir. 1987). And there is nothing in *I.B.E.W. Local 481 v. Sign-Craft, Inc.*, 864 F.2d 499 (7th Cir. 1988); *Mack Trucks, Inc. v. Intern. Union, UAW*, 856 F.2d 579 (3rd Cir. 1988); *Board of Trustees v. Universal Enterprises, Inc.*, 751 F.2d 1177, 1184 (11th Cir. 1985) to the contrary. The Solicitor General, in his brief in *Rozay's II*, *supra*, therefore, read all the cases holding that there is § 301 jurisdiction over contract formation issues as cases that necessarily apply "a uniform body of federal law" to the issues. *Id.* at 11.

to invalidate an agreement, not to enforce one, but federal law applies when the same issue is raised defensively.

(d) And one circuit, the Sixth, appears to hold that even if the validity question arises tangentially in the course of a suit seeking to *enforce* a collective bargaining agreement, there is no federal court jurisdiction over the issue. *See* Pet. 9-10.

Whenever a question of law has so divided the courts of appeal that there are more than two resolutions of the problem, the question is likely to be presented to this Court in a dispute in which the litigants have advocated some but not all of the possible theories and results. Nonetheless, the questions whether there is § 301 jurisdiction over a case of this kind, and whether there is *only* § 301 jurisdiction over such a case, are so closely linked that the answer to the first all but entails the answer to the second. It is only because the § 301 jurisdiction question had already been decided by the Ninth Circuit in *Rozay's II* that the court of appeals in this case was able to assume the answer to that jurisdictional question and to proceed directly to the preemption issue.

4. Finally, even taking the question presented here as one of first impression, respondents are wrong in their argument that the source of the law that governs disputes over collective bargaining agreement formation questions is not critical to the development of the national labor policy. Issues as to the validity of collective bargaining agreements based on the circumstances under which the agreements were negotiated arise with some frequency, and the possible conflict between state and federal law in adjudicating an agreement's validity would create intolerable confusion in both the negotiation and the application of labor agreements.

We believe that this Court's § 301 cases, read as a whole, point clearly to the conclusion that federal law, and federal law alone, governs in adjudicating such issues. But the court of appeals, and the respondents, have relied on a few sentences in recent opinions of this

Court, read out of context, to suggest that the federal law concerning the enforcement of collective bargaining agreements prevails over state law *only* where questions of contract interpretation are involved.[8]

To clarify that it was never this Court's intent to suggest that the area of § 301 preemption is narrower than the substantive coverage of the statute; to delineate the nature of a § 301 cause of action where one party seeks to establish that a collective bargaining agreement was entered into as a result of fraud; and to restore a nationally uniform federal common law governing the validity and application of collective bargaining agreements, this Court should grant *certiorari* in this case.

CONCLUSION

For the reasons stated above and in our Petition, this Court should grant certiorari and, after plenary review, reverse the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted,

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[8] The same language in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), discussing the need for the uniform interpretation of discrete contract clauses as a basis for § 301 preemption, has led to confusion in the court of appeal §301 preemption cases generally, including cases concerning state law causes of action different from those in this case. *See* the excellent summary and analysis in *McCormick v. AT&T Technologies, Inc.*, 934 F.2d 531, 539 (1991) (*en banc*) (Phillips, J., dissenting). This general difficulty in applying the "contract interpretation" approach to § 301 preemption is all the more reason to grant review in this case.

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APPENDIX

APPENDIX

APPENDIX

OWNER-OPERATOR SHORT FORM COLLECTIVE BARGAINING AGREEMENT WITH THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL UNION NO. 12

THIS AGREEMENT is entered into this 14 day of May, 1982, by and between Wilson Equipment, hereinafter called OWNER-OPERATOR, and the International Union of Operating Engineers, Local Union No. 12, hereinafter called the UNION.

ARTICLE I

The OWNER-OPERATOR hereby recognizes the UNION as the sole and exclusive bargaining representative of all persons employed by the OWNER-OPERATOR who perform any work of the nature included in the craft jurisdiction of the UNION.

This Agreement covers only such of the OWNER-OPERATOR'S activities in which he/she is functioning as an Employer, or is having persons or entities perform services for him/her. Where the OWNER-OPERATOR is himself/herself performing services for another person or entity, the OWNER-OPERATOR recognizes his/her obligation under the applicable multiple-employer agreement to perform such services as an employee of such person or entity, unless in accordance with the applicable provisions of the multiple-employer agreement the OWNER-OPERATOR can be, and has been designated and recognized as a sub-contractor. (OWNER-OPERATOR recognizes that if unincorporated, pension or other fringe benefit contributions may not be made by the OWNER-OPERATOR on himself/herself.)

ARTICLE II

The OWNER-OPERATOR and the UNION hereby agree to accept and be bound by all the terms and con-

ditions of the multiple-employer master labor agreement, hereinafter called the Master Agreement, in effect in the geographic area in which the work is performed. The Master Agreement designated in Article V of this Agreement shall be applicable to the operations of the OWNER-OPERATOR to the same effect as if the terms and conditions of the Master Agreement were set forth in full herein, except as otherwise expressly provided herein.

The OWNER-OPERATOR and the UNION further agree that, unless this Agreement is terminated by written notice from the OWNER-OPERATOR to the UNION strictly in accordance with Article IV of this Agreement, the OWNER-OPERATOR shall be bound by any modifications, amendments, renewals, successors, replacements, additions, or extensions of the Master Agreement as may be established through collective bargaining between the UNION and the appropriate multiple-employer associations party to the Master Agreement.

ARTICLE III

To the extent that the Master Agreement contains provisions with respect to grievance procedures, arbitrations (other than jurisdictional disputes under the Impartial Jurisdictional Disputes Board in the Building and Construction Industry), or commitments not to strike over grievances or claims of contract violation, the same shall not be in effect nor binding upon the parties to this agreement. If the parties meet to attempt to settle any such grievances and claims of contract violation by direct negotiation between duly authorized representatives of each of the parties, then any such settlement shall be final and binding, provided, however, that the UNION may not settle any claim asserted against the OWNER-OPERATOR by the trustees of employee benefit trusts.

Nothing contained in this Agreement, expressly or by implication, shall in any way limit or modify the right of each party to enforce this Agreement or adjust grievances by means of judicial or economic procedures, in-

cluding picketing or withholding of services, except that enforcement of the subcontracting clause shall be by judicial procedures. In the event of any judicial enforcement by the UNION, it shall be entitled to attorney's fees.

ARTICLE IV

This Agreement shall become effective on the date entered into as stated above and shall continue in effect for the full term of the Master Agreement, and for such additional term or terms of any modifications, amendments, renewals, additions, successors, replacements or extensions of the Master Agreement incorporated herein as set forth in Article II of this Agreement, until and unless either party to this Agreement gives written notice to the other party, not more than one hundred twenty (120) days nor less than ninety (90) days prior to the termination date of the Master Agreement then in effect of its desire to terminate this Agreement. Notice to the Union shall be effective only upon receipt at the Union's main office in Los Angeles County, California.

ARTICLE V

The multiple-employer Master Labor Agreement indicated below is the Master Agreement referred to and incorporated in this Agreement.

( ) Master Construction Agreement	( ) Master Dredge Agreement
( ) Master Asphalt Plant Agreement	( ) Master Steel Tank and Machinery Erection Agreement
( ) Master Shop Agreement	( ) Master Sanitary Landfill
( ) Master Survey Agreement	( ) Master Truck Crane Agreement

( ) Other _____

Formerly Known as: _____

OWNER-OPERATOR:

Wilson Equipment

Name of Company (Please Print)

662 Grand Ave.

Company Address

Spring Valley CA 92077

City, State Zip

388 047

State License Number

/s/ C. E. Wilson

Signature

C. E. Wilson

Signed by (Please Print)

Owner

Title of Person Signing

662 Grand Ave. Spring Valley CA 92077

Signatory Address

444-58-6686

Signatory Social Security No.

464-6721

Telephone No.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12

/s/ Illegible

Business Manager

/s/ Illegible

President

/s/ Illegible

Recording-Corresponding Secretary

/s/ Illegible

Business Representative

List name of each current employee of OWNER-OPERATOR, and Union affiliation, if any, of such employees at the time this agreement is signed.

NAME OF EMPLOYEE:	UNION AFFILIATION OR DESIGNATION (if any. If a member of UNION, list registration number)
Carroll Wilson	44-38.6686 Reg. # 1749671

No. 91-4

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In the Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL NO. 12, AFL-CIO, PETITIONER

v.

CARROLL WILSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a state tort claim for damages alleging that a union fraudulently induced an employer to enter into a collective bargaining agreement is preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. 185.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-4

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL NO. 12, AFL-CIO, PETITIONER

v.

CARROLL WILSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Through fraudulent representations, the International Union of Operating Engineers, Local 12 (the Union) secured a collective bargaining agreement with respondent Wilson Equipment Co. This case concerns the remedies available to redress that fraud.

1. Respondent Carroll Wilson, a co-owner of Wilson Equipment Co., received permission from a general contractor to remove dirt from a construction site. Pet. App. 3a. When Wilson began to remove the dirt, he was approached by Hoss Kinsey, a business agent of the Union. *Ibid.* Kinsey obtained Wilson's signature on a collective bargaining agreement with the Union in the

following manner; Kinsey told Wilson that "everyone working at the jobsite had to be 'union', and that Wilson could not continue removing the dirt unless he signed certain forms." *Ibid.* This statement was false. The Union representative knew that Wilson did not have to sign the forms in order to remove the dirt. *Ibid.*

Instead of reading the forms that Kinsey requested him to sign, however, Wilson asked Kinsey if signing the forms would change his status with the Union. Pet. App. 3a. Wilson was a member of the Union, but his company employed non-union labor. Kinsey responded with a second false statement. He represented that the forms would not change Wilson's status with the Union. *Ibid.* In reliance on these statements (*id.* at 5a), Wilson signed the forms on the hood of a car without reading them. *Id.* at 3a.

What Wilson did not know was this: The document he signed was a collective bargaining agreement entitled "Owner-Operator Short Form Collective Bargaining Agreement with [the Union]." Reply Br. 1-2. The agreement fundamentally altered Wilson's obligations to the Union. The agreement required the owner-operator to pay employees union wages and to make payments on their behalf to four union-management benefit trust funds (the Trusts). Pet. App. 3a-4a. At the time Wilson signed the agreement, his company had three employees who were not represented by the Union, but who were required, under the terms of the agreement, to be paid union wages. *Id.* at 3a.

When Wilson discovered what had transpired, he promptly notified the Trusts and the Union that the agreement was "void *ab initio* because of fraud." Pet. App. 31a. Wilson refused to make trust fund payments as required by the agreement. *Id.* at 4a.

2. Seeking recovery of required contributions, the Trusts sued respondents [1] in federal district court under

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[1] Respondents are Carroll Wilson, his wife Patricia Wilson, and their joint partnership, Wilson Equipment.

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. 185(a) (LMRA) and Section 502 of the Employment Retirement Income Security Act of 1974, 29 U.S.C. 1132 (ERISA). Respondents interposed an affirmative defense of fraudulent inducement. In addition, respondents filed a third-party complaint against the Union that included tort claims under California law. Pet. App. 4a. The complaint sought compensatory and punitive damages arising out of the Union's fraudulent conduct. *Id.* at 22a.

Prior to trial, the Union sought dismissal of the state law fraud claims on grounds of federal labor law preemption. The district court determined that the claim for "fraud in the inducement" was not preempted by federal law, but that the claim for "fraud in the execution" was preempted. Pet. App. 4a. Under this analysis, the court held that respondents' state law action for fraud could proceed to the extent that it was based upon the Union's representation that execution of the forms was required to perform work on the project site (fraud in the inducement), but that the action could not be based upon the other misrepresentation concerning Wilson's status with the Union (fraud in the execution). The court nevertheless permitted this claim for "fraud in the execution" to proceed to trial as a federal claim under Section 301. The court further found that the state law claim was the proper subject of pendent federal jurisdiction. Pet. App. 4a.

After a jury trial, respondents prevailed on all claims. The jury answered special interrogatories establishing that the Union representative's statements were intentionally false; that Wilson had justifiably relied upon those statements in signing the forms presented to him; and that Wilson had suffered $200,000 in damages for "lost time" and "emotional distress" as a result of the Union's fraud. Pet. App. 5a. The jury declined to award punitive damages. *Id.* at 22a. The district court accordingly entered judgment in favor of respondents on the Trusts' claim for contributions; entered judgment against the Union in the

amount of $200,000 on respondents' state law claim for fraud; awarded respondents rescission of the contract in the Section 301 action for fraud in the execution; and entered a separate award of attorneys' fees against the Union and the Trusts in the amount of $137,600. Pet. App. 5a-6a, 26a-33a.[2]

3. The Trusts did not appeal. For its part, the Union appealed from the district court's award of $200,000 for lost time and emotional distress under California tort law. Pet. App. 6a. The Union asserted that the claim was preempted under federal labor law. The Ninth Circuit, with one judge dissenting, upheld the award. *Id.* at 12a.

a. Relying on *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), the court of appeals determined that the state law "fraud in the inducement [claim] was not preempted by section 301 because it did not require reference to the owner-operator agreement signed by Wilson." Pet. App. 7a. The court reasoned that *Lingle* precludes preemption if the elements of the state cause of action can be established without "interpretation" of the terms of the collective bargaining agreement. *Ibid.* Applying that test, the court found that the terms of the collective bargaining agreement at issue were irrelevant to proof of the elements of the state law fraud claim: "(1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud, i.e. to induce reliance; (4) justifiable reliance; and (5) resulting damage." *Ibid.*

The court of appeals rejected the Union's claim that preemption was required by its prior decision in *Rozay's Transfer* v. *Local Freight Drivers, Local 208* (*Rozay's II*), 850 F.2d 1321 (9th Cir. 1988), cert. denied, 490 U.S. 1030 (1989). In *Rozay's II*, the court held that Section 301 conferred jurisdiction on federal courts to entertain an employer's federal common law claim for rescission

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[2] The fee award against the Trusts was based upon statutory authority under ERISA, 29 U.S.C. 1132(g)(1); fees were awarded against the Union as consequential damages for the fraud. Pet. App. 6a n.1, 27a-28a.

against a union for fraudulently inducing it to sign a collective bargaining agreement. The *Rozay's II* court reasoned that Section 301 is not limited to suits based upon a breach of a collective agreement, but also extends to "suits impugning the existence and validity of a labor agreement." Pet. App. 9a.[3] In the present case, however, the court found that *Lingle* would permit a state law fraud action parallel to the federal common law action recognized in *Rozay's II*—despite a potential for inconsistent results—because resolution of the state claim did not require interpretation of the labor agreement. Pet. App. 9a-10a.

b. The court of appeals also held that the state claim was not preempted under *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959). The court recognized that *Garmon* requires preemption of any state claim based upon conduct that is "arguably" subject to the National Labor Relations Board's exclusive jurisdiction over labor-management disputes regulated by the Act. The court found that the dispute in issue was not "arguably" regulated by the Act because the Union could not demonstrate that its "case is one that the [NLRB] could legally decide in [its] favor." Pet. App. 10a, quoting *International Longshoremen's Ass'n* v. *Davis*, 476 U.S. 380, 395 (1986).

The court premised this determination on two findings. First, the court held that the Union's conduct was not "arguably" an unfair labor practice regulated by Section 8(b) of the National Labor Relations Act, 29 U.S.C. 158(b). Although Section 8(b)(3) regulates a union's obligations to "bargain collectively with an employer, provided it is the representative of his employees," the court found this section inapplicable. Pet. App. 12a. The court reasoned

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[3] In *Rozay's II*, the court held that rescission and indemnification were appropriate remedies for a finding of fraud in the inducement in a Section 301 action brought by an employer against the union that signed the contract.

thus: it is undisputed that the Union did not represent Wilson's employees, and "[t]he facts here fail to reveal that Wilson and Kinsey were 'bargaining' prior to Wilson signing the agreement on the hood of Kinsey's car." *Id.* at 11a.

Second, the court held that the conduct was not subject to the Board's jurisdiction under Section 8(f), 29 U.S.C. 158(f), of the NLRA. Pet. App. 11a. Under Section 8(f), unions and employers in the construction industry are permitted to negotiate an agreement that requires employees who wish to work on the construction site to be covered by a union agreement. These agreements are referred to as "pre-hire contracts." The court determined that the agreement's "plain language does not support a characterization as a pre-hire contract." Pet. App. 11a. The court therefore held that the agreement was not subject to regulation under the Act. *Ibid.*

c. Judge Canby dissented. Pet. App. 12a-16a. He concluded that the state law fraud claim was preempted under Section 301 because the availability of the damages sought by respondents depended "upon the *invalidity* of the collective bargaining agreement that Carroll Wilson signed." Pet. App. 13a. In the dissent's view, respondents' "distress * * * followed from the claims and entanglements arising from the agreement itself—the claims by the trusts, the necessity of defending them, and the threat of financial liability. If the agreement was valid, that distress is not compensable." *Id.* at 14a.

Judge Canby agreed with the formulation that "*Lingle* establishes that a state claim is not independent" of the collective bargaining agreement "when it requires construction" of the agreement, but he concluded that this test was satisfied here. Pet. App. 14a. "To hold that a collective bargaining agreement means nothing—that it is invalid—is the most radical form of construction." *Ibid.* Judge Canby concluded that "the entire state-law claim

depends upon an implicit threshold determination that the collective bargaining agreement signed by Carroll Wilson was invalid." *Id.* at 15a-16a. In his view, "such a determination may only be made as a matter of federal law," and this conclusion required preemption of the state claim. *Id.* at 16a.

DISCUSSION

The nature of the remedies available under Section 301 for fraudulent inducement of a collective bargaining agreement represents an important and recurring question. In our judgment, however, the sole issue presented by this petition—whether state remedies for fraudulent inducement are preempted—does not warrant review. This is a novel issue as to which there is no disagreement among the courts of appeals. Although we do not believe that the court of appeals properly analyzed the issue presented, we are of the view that it is unnecessary for this Court to determine whether the state law claim for damages was preempted on the highly unusual facts of this case.

1. Claims of fraudulent inducement in the collective bargaining process have typically raised several interrelated issues under Section 301 of the Labor Management Relations Act (LMRA) and the *Garmon* preemption doctrine of the National Labor Relations Act (NLRA). See *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959). The process of collective bargaining between an employer and a union representing its employees is regulated through the unfair labor practice jurisdiction of the Board under Section 8 of the NLRA, and *Garmon* provides that conduct that is "arguably" regulated by the NLRA falls within the Board's exclusive jurisdiction. 359 U.S. at 245. Section 301 of the LMRA, on the other hand, vests federal courts with jurisdiction to adjudicate "[s]uits for violation of contracts between an employer and a labor organization." 29 U.S.C. 185.

a. In light of this legal framework, an employer's claim that it has been fraudulently induced to enter into a collective bargaining agreement raises the following issues concerning the proper remedy: (1) whether *Garmon* precludes either state or federal court adjudication of a claim based upon wrongful inducement in the collective bargaining process; (2) whether a federal court has jurisdiction under Section 301 over an employer's claim of fraudulent inducement, even though the claim does not literally represent a "suit for violation of [a] contract"; (3) if federal courts have jurisdiction over such claims under Section 301, what are the standards for liability and the permissible remedies (such as rescission, restitution, or compensatory or punitive damages); and (4) whether Section 301 preempts a state tort claim for fraud that occurs in the negotiation of the collective bargaining agreement.

In this case, only the fourth issue is presented. Petitioner does not challenge the court of appeals' conclusion that respondents' state law fraud claim was not preempted by *Garmon*. The parties also accept the district court's finding—which was not at issue in the court of appeals—that attorneys' fees and rescission of the agreement were properly awarded under Section 301. The sole issue, then, is whether the $200,000 award for emotional distress and lost time under state law is preempted by Section 301.

b. To our knowledge, no other court of appeals has addressed the question whether Section 301 preempts a state law tort action for fraudulent inducement. Petitioner does not contend otherwise. Instead, petitioner premises its request for review on the contention that a conflict exists in the circuits on a related issue: whether Section 301 provides federal jurisdiction to entertain a claim by an employer seeking to invalidate a collective bargaining agreement on grounds of fraudulent inducement.[4] Pet. 9-12.

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[4] The Ninth Circuit and four other courts of appeals have held that Section 301 encompasses claims of contract invalidity. See

In a brief amicus curiae filed with this Court in *Local Freight Drivers, Local 208* v. *Rozay's Transfer*, No. 88-535, the United States agreed with the position of the Ninth Circuit in *Rozay's II* (which the court in this case did not question), that Section 301 creates jurisdiction for such claims. As we explained in our brief, at 11 (footnotes omitted):

> Fraud in the inducement is a traditional contractual defense that can be interposed in a Section 301(a) action for breach of a collective bargaining agreement. When such a defense is raised, its validity is determined by reference to federal common law. If a purpose of Section 301(a) is to provide a uniform body of federal law that is consistently applicable to "disputes arising out of labor contracts" (*Allis-Chalmers Corp.*, 471 U.S. [202,] 209) [(1985)], that section must also apply to suits seeking to invalidate contracts on the same ground. Any different result would mean that the forum for the dispute, and possibly the applicable law, would depend on which of the parties to a collective agreement was at the top of the caption in a case in which fraud was the decisive issue.

Review of the decision below does not present an appropriate occasion to resolve the issue in *Rozay's II*, how-

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Rozay's II, *supra*; *IBEW, Local 481* v. *Sign-Craft, Inc.*, 864 F.2d 499 (7th Cir. 1988); *Mack Trucks, Inc.* v. *International Union, UAW*, 856 F.2d 579 (3d Cir. 1988); *McNally Pittsburgh, Inc.* v. *International Iron Workers*, 812 F.2d 615, 618-619 (10th Cir. 1987); *Board of Trustees* v. *Universal Enterprises, Inc.*, 751 F.2d 1177, 1184 (11th Cir. 1985). See also *United Steelworkers of America* v. *Rome Indus., Inc.*, 437 F.2d 881, 882 (5th Cir. 1970) (Section 301 jurisdiction over union claim for enforcement of unexecuted contract). The Sixth and Fourth Circuits, on the other hand, hold that there is no cause of action under Section 301 for these claims. *Heussner* v. *National Gypsum Co.*, 887 F.2d 672, 676 (6th Cir. 1989); *A.T. Massey Coal Co.* v. *International Union, UMW*, 799 F.2d 142 (4th Cir. 1986), cert. denied, 481 U.S. 1033 (1987). See also *Hernandez* v. *National Packing Co.*, 455 F.2d 1252 (1st Cir. 1972) (no jurisdiction under Section 301 where contract is claimed to be invalid because union had lost majority support of unit employees).

ever, because the question whether Section 301 creates an affirmative federal remedy for fraudulent inducement is simply not presented. That question was neither briefed nor argued on appeal. See Resp. Opp. 6 ("All parties assumed that § 301 provides subject matter jurisdiction to decide the validity or existence of a collective bargaining agreement."). Further, if certiorari were granted, neither party would have an appropriate incentive for advocating the position—adopted by some of the circuits —that Section 301 does not create a cause of action for rescission of a contract based upon fraudulent inducement. Respondents prevailed on a Section 301 claim in the district court, and petitioners agree that such a remedy is appropriate under Section 301.

c. We also do not believe that the Section 301 preexemption issue is likely to be dispositive in many future cases. Rather, we believe that the availability of a state law damage claim for fraud in the collective bargaining process will ordinarily be foreclosed by application of the *Garmon* doctrine.

Although the court of appeals in this case found that *Garmon* did not preempt respondents' state law claim—a decision that petitioner does not challenge—it did so based upon the unusual facts presented. *Garmon* preempts state claims based upon conduct that is "arguably" subject to regulation by the NLRB. The court of appeals therefore acknowledged (Pet. App. 12a n.5) that *Garmon* would normally preempt the state fraud claim at issue because a union's fraudulent conduct in the course of contract negotiations with an employer is regulated by the NLRB and is subject to its exclusive jurisdiction. See *Parker* v. *Connors Steel Co.*, 855 F.2d 1510, 1516-1518 (11th Cir. 1988), cert. denied, 490 U.S. 1066 (1989); *Serrano* v. *Jones & Laughlin Steel Co.*, 790 F.2d 1279, 1286-1287 (6th Cir. 1986). Here, however, the court reached a different result, because the Union did not represent the company's employees, and the facts "fail[ed]

to reveal that Wilson and Kinsey were 'bargainng' prior to Wilson signing the agreement on the hood of Kinsey's car." Pet. App. 11a; *id.* at 12a.

There is no reason to believe that this highly peculiar fact pattern is likely to recur with any frequency, as evidenced by the paucity of similar reported cases. We therefore see little need to grant certiorari to determine whether Section 301 requires preemption of a state law claim for fraud in the unusual circumstances where *Garmon* preemption is not applicable.

3. In light of these considerations, it is our view that a grant of certiorari in this case is unwarranted. At the same time, however, we believe that the court of appeals erred in its analysis of the Section 301 preemption issue.

a. In *Local 174 Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962) and *Avco Corp.* v. *Aero Lodge No. 735, Int'l Ass'n of Machinists*, 390 U.S. 557 (1968), this Court held that the state law of contracts is completely preempted by Section 301. Section 301 provides the exclusive cause of action for contract claims based on collective bargaining agreements. Those claims must be resolved under federal law.

In *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985) and *United Steelworkers* v. *Rawson*, 495 U.S. 362 (1990), the preemptive scope of Section 301 was further extended to tort claims premised upon inadequate performance of a duty imposed by a collective bargaining agreement. In *Lingle*, however, the Court emphasized that Section 301 preemption of state tort claims is limited. Section 301 does not preempt parallel state tort remedies predicated upon a duty or standard of conduct not imposed by a collective bargaining agreement, because, in those cases, interpretation of the agreement is not required. 486 U.S. at 413.

b. In applying these precedents, the court of appeals correctly concluded that it must first look to the elements of the state tort claim brought against a party to a col-

lective bargaining agreement. Pet. App. 7a; *Lingle*, 486 U.S. at 407. The court was also correct in concluding that proof of the tort of intentional fraud under California law did not require interpretation of any *term* of the collective bargaining agreement on the facts presented.[5] Pet. App. 7a-8a.

We do not share the panel's view, however, that the preemption inquiry ended there. The court appears to have assumed that preemption is only triggered by the necessity for interpreting a *term* of the contract. Pet. App. 7a. The court did not address the dissent's contention (*id.* at 13a) that, even though proof of the claim did not require interpretation of the specific terms of the agreement, it nevertheless did turn on proof that the contract was invalid and unenforceable. The majority appears to have concluded that *Lingle* only requires application of uniform federal law to issues of contract interpretation, not to issues of contract formation. *Id.* at 9a-10a.

We disagree. In our view, the question whether a valid and binding contract was formed must be governed by federal law; the court of appeals accordingly should have determined whether the validity of the contract was placed in issue by the state tort claim in a manner that would require preemption.

c. This Court's Section 301 precedents require development and application of a uniform body of federal contract law governing collective bargaining agreements. We understand these precedents to extend to issues of contract formation as well as contract "interpretation."

By its terms, Section 301 requires federal courts to adjudicate suits "for violation of contracts." In a case such as this, where Union Trusts sue an employer who has failed to make payments due under a contract and

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[5] The court did not examine the elements of the state tort of negligent misrepresentation. The judge instructed the jury on the elements of this tort as well (Pet. App. 20a), but the jury found that the conduct was intentional. *Ibid.* The court of appeals was thus not required to determine whether the negligent misrepresentation claim was preempted.

the employer interposes a defense of fraudulent inducement, a court must determine whether a valid and binding contract was formed in order to determine whether the employer has "violat[ed]" the contract. It would make little sense to conclude that federal law governs the question whether a term of the contract was "violated", but not the question whether a valid and enforceable contract exists.

This Court's precedents fully support the conclusion that issues of contract formation and enforceability must be governed by federal law. Although *Lingle* does not require that all issues of *tort* law affecting relations under a collective bargaining agreement be determined under federal law, it clearly does carry forward the requirement established in *Lucas Flour* that all issues of *contract* law must be decided under federal law. 486 U.S. at 413 n.12. The legal standards governing the formation of contracts, including standards for voiding a contract on grounds of fraud, are very much a part of the substantive body of contract law. Cf. *Kossick* v. *United Fruit Co.*, 365 U.S. 731 (1961) (finding that a state statute of frauds invalidating oral contracts was preempted by the federal common law governing admiralty contracts).

It exalts "form over substance," *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. at 211, to read *Lingle* as limiting the scope of preemption to state claims that are dependent upon the interpretation of some particular *term* of a contract. To be sure, in evaluating the preemption issue, the Court in *Lingle* focused at one point on whether resolution of the state claim "turn[ed] on the meaning of any *provision* of a collective-bargaining agreement" (emphasis added). However, the Court also stated that whether a claim is "independent" of the agreement for Section 301 preemption purposes depends on whether "resolution of the state-law claim * * * [requires] construing the collective bargaining agreement." 486 U.S. at 407. If resolution of a fraud claim turns on or determines the validity of the collective bargaining agreement in its entirety, then it surely involves contract "construction."

Moreover, the use of a single legal standard governing the validity of contracts is no less important to "interpretative uniformity and predictability" of the law governing collective bargaining agreements than is the use of a single standard to fix the meaning of discrete contract terms. The congressional concern animating Section 301 —that a uniform body of federal law "be used to address disputes arising out of labor contracts" (*Lueck*, 471 U.S. at 209)—applies with equal force whether the issue is the meaning of particular contract terms or the validity of the contract itself.

This case illustrates the potential for disuniformity on the question of contract validity. The jury was charged that it could find fraudulent inducement under California law if the misrepresentations were negligent (Pet. App. 20a-21a), but that it could only find fraudulent inducement under federal law if the misrepresentations were intentional. *Id.* at 24a. Although the jury ultimately determined that the misrepresentations were intentional (*id.* at 4a-5a), the instructions would have permitted the jury to determine that the same statements constituted fraud sufficient to invalidate the contract under state law but not under Section 301.

Although *Lingle* tolerates potentially inconsistent factual determinations in state and federal proceedings, 486 U.S. at 408-410, it does not tolerate disuniformity in the legal standards governing contract construction. *Id.* at 409. It is therefore consistent with *Lingle* to conclude that Section 301 requires that issues concerning the validity of labor contracts be determined under federal law.

d. Even though the court of appeals did not recognize that issues of contract formation and enforceability must be resolved under uniform federal law, we do not believe that it is necessary for this Court to grant review to rearticulate and apply that principle. First, the question whether resolution of the state law claim here would

"turn on" (*Lingle*, 486 U.S. at 407) or determine the enforceability of the collective bargaining agreement depends upon the proper construction of California law and an analysis of the specific factual claims asserted.[6]

Second, even if the dissent correctly concluded that proof of the claim here turned on whether the contract was valid and enforceable, it does not necessarily follow that the court of appeals erred by finding that the state fraud cause of action was not preempted in its entirety. *Lingle* indicates that in some circumstances the need for uniform contract law under Section 301 is satisfied by a more limited form of preemption that permits the state tort action to proceed, subject to the requirement that the contract issue be determined under federal law. See *Lingle*, 486 U.S. at 413 n.12 (noting that some state law claims that "depend for [their] resolution upon both the interpretation of a collective-bargaining agreement and a

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[6] Judge Canby concluded that, under state law, respondents' claim did turn on the question of whether the contract was valid and enforceable. Damages are an element of the tort of fraud, and he reasoned that the specific damages sought in this case—lost time and emotional distress sustained in defending against the Trusts' efforts to enforce the contract—were only compensable under state law if the collective bargaining agreement was invalid and unenforceable as a matter of contract law. However, Judge Canby recognized that this would be a different case if the claim for damages did not depend on the validity of the contract. See Pet. App. 14a.

State law claims based upon fraudulent inducement may have an effect on contract validity in a number of ways. For example, a claim that seeks rescission or a declaration of invalidity on grounds of fraud would, in our view, be totally preempted. In awarding these remedies, the court makes a direct determination of contract validity, and thus decides an issue of contract law that should be governed exclusively by Section 301. A state fraud claim that could result in a decision rendering a contract "voidable" may also be preempted by federal law to the extent that it alters the legal status of the contract. Finally, if a collective bargaining agreement is held *valid* under the federal contract standards governing fraudulent inducement, Section 301 would likely bar any award of damages for fraudulent inducement under state tort law.

separate state law analysis" are not preempted, although "federal law would govern the interpretation of the agreement").

In this case, the court found that the contract was invalid and unenforceable under *federal* law by virtue of its resolution of respondents' Section 301 claim for rescission. Pet. App. 2a, 30a-33a. It is, accordingly, unclear whether complete preemption of the state tort claim would be required under these circumstances. When a contract has been declared void under Section 301 because of fraudulent inducement, no consensual remedy for damages is available, and the uniformity of federal contract law under Section 301 may not be impaired by permitting state tort law to provide compensation for personal injuries occasioned by fraudulent conduct.[7] The court of appeals therefore might have found insufficient justification under this Court's precedents for overriding the State's interest in providing compensation to citizens injured by intentionally tortious activity in these circumstances. See, *Lingle*, 486 U.S. at 413 n.12 (indicating that a state tort action is not preempted if proof of the amount of damages requires interpretation of a collective bargaining agreement); *Allis-Chalmers*, 471 U.S. at 212 (stating that Section 301 does not preempt "state rules that proscribe conduct, or establish rights and obligations independent of a labor contract"). Cf. *Farmer* v. *Carpenters*, 430 U.S. 290 (1977) (no *Garmon* preemption of a union member's action for intentional infliction of emotional distress against a union where the claim could be resolved independent of employment discrimination issues within the coverage of the NLRA). However, we do not here purport to resolve the question whether state

[7] Courts have found that Section 301 law permits the award of some types of damages arising out of fraudulent inducement under contract principles. See, *e.g.*, Pet. App. 27a. It would not appear that the common law of contracts under Section 301 could properly be construed to permit recovery of damages for personal injury, such as emotional distress, however. Thus, the tort remedy sought in this case is not merely duplicative of a Section 301 remedy.

tort damages are available when a contract has been fraudulently induced under the standard established by the federal common law.

In sum, even if the court of appeals erred in its analysis of the law or its ultimate conclusion, we do not think that, in light of the unusual facts and circumstances of this case, the decision poses a serious threat to the federal interest in uniform rules governing the formation of valid collective bargaining agreements.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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